# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 100

THE A. B. SMALL COMPANY, PLAINTIFF IN ERROR,

vs.

LAMBORN & COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

FILED JUNE 20, 1925

(29,700)

# (29,709)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1923

# No. 399

THE A. B. SMALL COMPANY, PLAINTIFF IN ERROR,

*vs.*

LAMBORN & COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

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[fol. 1] IN THE

**DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA**

LAMBORN & COMPANY, a Copartnership, Plaintiff,

vs.

THE A. B. SMALL COMPANY, Defendant

PETITION—Filed Sept. 12, 1921

To the Honorable the District Court of the United States for the Western Division of the Southern District of Georgia:

The petition of A. H. Lamborn, G. P. Tameling, H. B. Hutchins, N. N. Keen, George H. Logan, Karl P. Lindgren, C. C. Riggs, C. G. Troup, W. V. Wood, B. W. Dyer, and Victor R. Hess, copartners using the firm name and style of Lamborn & Company, respectfully shows:

First Count

[fol. 2] 1. That A. H. Lamborn is a citizen and a resident of the State of New Jersey; G. P. Tameling is a citizen and a resident of the State of New York; H. B. Hutchins is a citizen and a resident of the State of New Jersey; N. N. Keen is a citizen and a resident of the State of New Jersey; George H. Logan is a citizen and a resident of the State of New Jersey; Karl P. Lindgren is a citizen and a resident of the State of Pennsylvania; C. C. Riggs is a citizen and a resident of the State of New Jersey; C. G. Troup is a citizen and a resident of the State of New Jersey; W. V. Wood is a citizen and a resident of the State of New Jersey; B. W. Dyer is a citizen and a resident of the State of New York; and Victor R. Hess is a citizen and a resident of the State of New York; and that petitioners are copartners under the firm name and style of Lamborn & Company.

2. That the A. B. Small Company, hereinafter called the defendant, is a corporation duly organized and existing under the laws of the State of Georgia, having its office and place of business in the City of Macon, County of Bibb and State of Georgia, and in the Western Division of the Southern District of Georgia; and for the purpose of jurisdiction is a citizen of the State of Georgia.

3. That this suit is between citizens of different States and the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

4. That under date of April 30, 1920, petitioners and defendant executed in duplicate, and each delivered to the other, a certain agreement, a copy of which is hereto attached, marked "Exhibit A" and made part hereof.

5. By the terms of said agreement your petitioners sold to defendant, and defendant bought from petitioners, one hundred and fifty (150) barrels of standard Fine Granulated sugar on the basis of 25.50 cents per pound f. o. b. Savannah Refinery, Port Wentworth, Georgia.

[fol. 3] 6. By the terms of said contract, shipment of said sugar was to be made by petitioners between July 15th and October 1, 1920; the particular date or dates of shipment within said period to be at seller's option, subject to delay if any.

7. That under date of May 7, 1920, petitioners and defendant executed in duplicate, and each delivered to the other, a second certain agreement, a copy of which is hereto attached, marked "Exhibit B" and made part hereof.

8. By the terms of said second contract, petitioners sold to defendant, and defendant bought from petitioners, three hundred (300) barrels of standard Fine Granulated sugar on the basis of 25.50 cents per pound f. o. b. Savannah Refinery, Port Wentworth, Georgia.

9. By the terms of said second contract, shipment of said sugar was to be made by petitioners in equal quantities monthly, beginning the last half of July and continuing through August and September, 1920, if possible; but at seller's option of shipping to suit seller's convenience during the period mentioned, subject to delay if any.

10. Under both of said contracts, the terms of payment for said sugars were to be cash before delivery less two (2) per cent, or cash in seven (7) days after delivery less two (2) per cent, according as the seller's credit department might approve the one or the other mode of payment.

11. By the terms of both of said contracts, petitioners agreed to furnish said sugars packed in barrels or bags, but reserved the option of shipping no more than fifty per cent (50%) of contract in 100-pound bags; and agreeing but not guaranteeing to furnish 2, 5, 10, and 25-pound bags at the ruling differential above Fine Granulated basis if desired by the trade, provided said packages are obtainable.

12. Under the general custom and usage prevailing in the sugar trade under which said two above mentioned contracts were made, the [fol. 4] sugar which petitioners contracted to sell, and defendant contracted to buy, might be furnished either in barrels containing approximately 350 pounds net sugar, or in 100-pound bags, and when shipped in such bags was known and regarded as in bulk; and according to said general custom and usage said sugar might be packed in 2, 5, 10, or 25-pound bags or packages, which smaller packages would be enclosed in 100-pound bags, and when so packed the sugar would be listed and referred to so as to indicate the number and weight of the several smaller packages. At the time of the performance of the two above mentioned contracts the ruling differential above Fine Granulated sugar, the basis named in the con-

tract, where the sugar was furnished in 2, 5, 10, or 25-pound bags packed as hereinbefore referred to, was as follows:

100-pound bag containing 4-25-lb. bags (4/25's), 20/100 of a cent per lb.

100-pound bag containing 10-10-bags (10/10's), 30/100 of a cent per lb.

100-pound bag containing 20-5-lb. bags (20/5's), 40/100 of a cent per lb.

13. By the terms of the two contracts hereinbefore referred to, the sugar was purchased by defendant of petitioners f. o. b. Savannah Refinery, Port Wentworth, Georgia, the contract further providing that if shipment is made freight prepaid, the ruling prepaid freight basis to destination in effect on the date of shipment will govern. During the months of July and August, 1920, the freight rate from Port Wentworth to Macon, Georgia, on sugar packed in barrels amounted to .269 of a cent per pound; on sugar packed in bags .255 of a cent per pound. During the months of September and October, 1920, the freight rate from Port Wentworth to Macon, Georgia, on sugar packed in barrels amounted to .337 of a cent per pound; on sugar packed in bags .317 of a cent per pound.

14. Defendant furnished shipping instructions and assortments as contemplated by said contracts for the first or July shipment of sugar, to-wit: 50 barrels under the contract dated April 30, 1920, and 100 barrels under the contract dated May 7, 1920.

15. Petitioners shipped said sugar in accordance with said shipping instructions, and defendant received and accepted same and paid therefor in accordance with the contracts.

16. During the period provided by said contracts, petitioners requested and defendant furnished shipping instructions and assortments as contemplated by said contracts for the August shipment of sugar under said contracts, to-wit: 150 barrels, being 50 barrels under contract dated April 30, 1920, and 100 barrels under contract dated May 7, 1920.

17. Petitioners duly forwarded said one hundred and fifty (150) barrels of sugar in accordance with the said contracts and the shipping instructions given by defendant.

18. But upon the arrival of the said sugar at its destination [fol. 5] the defendant failed and refused to accept, receive or pay for the same and notified petitioners that it would not accept the said sugar; and at the same time also notified petitioners that it would not give any further shipping instructions or assortments as provided in the contracts and would not accept any additional sugar which might be shipped by petitioners under the said contracts, and directed petitioners not to ship any additional sugar, the said defendant repudiating said contracts.

19. And the said defendant continually declined to accept and pay for the one hundred and fifty (150) barrels of sugar shipped in accordance with its said instructions, and failed and refused to give any additional instructions or assortments for the balance of the sugar purchased under the said two contracts, and at no time during the period provided in said two contracts respectively for the delivery of said sugars, furnished petitioners any shipping instructions or assortments, but continually refused so to do.

20. During the period provided for in the said two agreements for the shipment of said sugars your petitioners requested the said defendant to furnish shipping instructions and assortments, but the said defendant failed and refused so to do.

21. In the meantime, and since the dates of said two respective agreements, the market value of sugar had materially declined.

22. Petitioners further, and within the time provided in the said two contracts respectively for the shipment of said sugars, notified the said defendant of their readiness to ship the said sugar and again requested shipping instructions and assortments and notified defendant that any further delay in furnishing the same would constitute a breach of its contract, and that petitioners would proceed to sell the said sugar for its account and at its risk and hold it for the difference between the contract price and the prices obtained on such resale.

[fol. 6] 23. That the said defendant persisted in its failure to furnish shipping instructions and assortments, which it had agreed to furnish when requested, and denied any liability under the said two agreements above mentioned.

24. At no time prior to the first day of October, 1920, when the contract time for shipment of the said sugars under said contracts respectively expired, nor on said date, nor thereafter at any time did the said defendant furnish to petitioners any shipping instructions or assortments for the said sugars.

25. With reasonable promptness after October 1, 1920, your petitioners resold the said three hundred (300) barrels of sugar for the account of the said defendant and at its risk, and acting for this purpose as its agent, first giving to the said defendant notice of its intention to resell, notice of the prices at which petitioners had an opportunity to resell, and first giving to the said defendant an opportunity to furnish a better bid.

26. Said defendant furnished no bid for said 300 barrels of sugar, or any part thereof, in response to petitioners' notice and continued to refuse to accept, take and pay for the 150 barrels of sugar shipped by petitioner in accordance with its shipping instructions.

27. Petitioners attach hereto and make a part hereof an itemized statement, marked "Exhibit C", showing the several purchasers at the resale of the said sugar, the price paid therefor, the several quantities

sold by petitioners to each purchaser, the dates of resale, and the expenses incident thereto, all of which said expenses were reasonable, proper and necessary. A copy of said statement has been duly furnished by petitioners to the said defendant.

28. The difference between the contract price of said three hundred (300) barrels of sugar and the price obtained therefor on the [fol. 7] resale, together with the expenses incident thereto, was the sum of $15,218.14, as is shown by the statement hereinbefore referred to.

Wherefore, petitioner prays judgment against the said The A. B. Small Company, defendant, for the principal sum of Fifteen Thousand, Two Hundred Eighteen and 14/100 ($15,218.14) Dollars, as well as for lawful interest thereon at the rate of seven per cent. (7%) per annum.

[fol. 8] Second Count

1. That A. H. Lamborn is a citizen and a resident of the State of New Jersey; G. P. Tameling is a citizen and a resident of the State of New York; H. B. Hutchins is a citizen and a resident of the State of New Jersey; N. N. Keen is a citizen and a resident of the State of New Jersey; George H. Logan is a citizen and a resident of the State of New Jersey; Karl P. Lindgren is a citizen and a resident of the State of Pennsylvania; C. C. Riggs is a citizen and a resident of the State of New Jersey; C. G. Troup is a citizen and a resident of the State of New Jersey; W. V. Wood is a citizen and a resident of the State of New Jersey; B. W. Dyer is a citizen and a resident of the State of New York; and Victor R. Hess is a citizen and a resident of the State of New York; and that petitioners are copartners under the firm name and style of Lamborn & Company.

2. That The A. B. Small Company, hereinafter called the defendant, is a corporation duly organized and existing under the laws of the State of Georgia, having its office and place of business in the City of Macon, County of Bibb and State of Georgia, and in the Western Division of the Southern District of Georgia; and for the purpose of jurisdiction is a citizen of the State of Georgia.

3. That this suit is between citizens of different States and the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

4. That under date of April 30, 1920, petitioners and defendant executed in duplicate, and each delivered to the other, a certain agreement, a copy of which is hereto attached, marked "Exhibit A" and made part hereof.

5. By the terms of said agreement your petitioners sold to defendant, and defendant bought from petitioners, one hundred and fifty (150) barrels of standard Fine Granulated sugar on the basis of

25.50 cents per pound f. o. b. Savannah Refinery, Port Wentworth, Georgia.

[fol. 9] 6. By the terms of said contract, shipment of said sugar was to be made by petitioners between July 15th and October 1, 1920; the particular date or dates of shipment within said period to be at seller's option, subject to delay if any.

7. That under date of May 7, 1920, petitioners and defendant executed in duplicate, and each delivered to the other, a second certain agreement, a copy of which is hereto attached, marked "Exhibit B" and made part hereof.

8. By the terms of said contract, petitioners sold to defendant, and defendant bought from petitioners, three hundred (300) barrels of standard Fine Granulated sugar on the basis of 25.50 cents per pound, f. o. b. Savannah Refinery, Port Wentworth, Georgia

9. By the terms of said second contract, shipment of said sugar was to be made by petitioners in equal quantities monthly, beginning the last half of July and continuing through August and September, 1920, if possible; but at seller's option of shipping to suit seller's convenience during the period mentioned, subject to delay if any.

10. Under both of said contracts, the terms of payment for said sugars were to be cash before delivery less two (2) per cent, or cash in seven (7) days after delivery less two (2) per cent, according as the seller's credit department might approve the one or the other mode of payment.

11. By the terms of both of said contracts, petitioners agreed to furnish said sugars packed in barrels or bags, but reserved the option of shipping no more than fifty per cent (50%) of contract in 100-pound bags; and agreeing but not guaranteeing to furnish 2-, 5-, 10-, and 25-pound bags at the ruling differential above Fine Granulated basis if desired by the trade, provided said packages are obtainable.

12. Under the general custom and usage prevailing in the sugar trade under which said two above mentioned contracts were made, [fol. 10] the sugar which petitioners contracted to sell, and defendant contracted to buy, might be furnished either in barrels containing approximately 350 pounds net sugar, or in 100-pound bags, and when shipped in such bags was known and regarded as in bulk; and according to said general custom and usage said sugar might be packed in 2-, 5-, 10-, or 25-pound bags or packages, which smaller packages would be enclosed in 100-pound bags, and when so packed the sugar would be listed and referred to so as to indicate the number and weight of the several smaller packages. At the time of the performance of the two above mentioned contracts the ruling differential above Fine Granulated sugar, the basis named in the contract, where the sugar was furnished in 2-, 5-, 10-, or 25-pound bags packed as hereinbefore referred to, was as follows:

100-pound bag containing 4—25-lb. bags (4/25's), 20/100 of a cent per lb.
100-pound bag containing 10—10-lb. bags (10/10's), 30/100 of a cent per lb.
100-pound bag containing 20—5-lb. bags (20/5's), 40/100 of a cent per lb.

13. By the terms of the two contracts hereinbefore referred to, the sugar was purchased by defendant of petitioners f. o. b. Savannah Refinery, Port Wentworth, Georgia, the contract further providing that if shipment is made freight prepaid, the ruling prepaid freight basis to destination in effect on the date of shipment will govern. During the months of July and August, 1920, the freight rate from Port Wentworth to Macon, Georgia, on sugar packed in barrels amounted to .269 of a cent per pound; on sugar packed in bags .255 of a cent per pound. During the months of September and October, 1920, the freight rate from Port Wentworth to Macon, Georgia, on sugar packed in barrels amounted to .337 of a cent per pound; on sugar packed in bags .317 of a cent per pound.

14. Defendant furnished shipping instructions and assortments as contemplated by said contracts for the first or July shipment of sugar, to-wit: 50 barrels under the contract dated April 30, 1920, and 100 barrels under the contract dated May 7, 1920.

15. Petitioners shipped said sugar in accordance with said shipping instructions, and defendant received and accepted same and paid therefor in accordance with the contracts.

16. During the period provided by said contracts, petitioners requested and defendant furnished shipping instructions and assortments as contemplated by said contracts for the August shipment of sugar under said contracts, to-wit: 150 barrels, being 50 barrels under contract dated April 30, 1920, and 100 barrels under contract dated May 7, 1920.

17. Petitioners duly forwarded said one hundred and fifty (150) barrels of sugar in accordance with the said contracts and the shipping instructions given by defendant.

18. But upon the arrival of the said sugar at its destination the [fol. 11] defendant failed and refused to accept, receive or pay for the same and notified petitioners that it would not accept the said sugar; and at the same time also notified petitioners that it would not give any further shipping instructions or assortments as provided in the contracts and would not accept any additional sugar which might be shipped by petitioners under the said contracts, and directed petitioners not to ship any additional sugar, the said defendant repudiating said contracts.

19. And the said defendant continually declined to accept and pay for the one hundred and fifty (150) barrels of sugar shipped in ac-

cordance with its said instructions, and failed and refused to give any additional instructions or assortments for the balance of the sugar purchased under the said two contracts, and at no time during the period provided in said two contracts respectively for the delivery of said sugars, furnished petitioners any shipping instructions or assortments, but continually refused so to do.

20. During the period provided for in the said two agreements for the shipment of said sugars your petitioners requested the said defendant to furnish shipping instructions and assortments, but the said defendant failed and refused so to do.

21. In the meantime, and since the dates of said two respective agreements, the market value of sugar had materially declined.

22. Petitioners further, and within the time provided in the said two contracts respectively for the shipment of said sugars, notified the said defendant of their readiness to ship the said sugar and again requested shipping instructions and assortments and notified defendant that any further delay in furnishing the same would constitute a breach of its contract.

23. That the said defendant persisted in its failure to furnish shipping instructions and assortments, which it had agreed to furnish when requested, and denied any liability under the said two agreements above mentioned.

[fol. 12] 24. At no time prior to the first day of October, 1920, when the contract time for shipment of the said sugars under said contracts respectively expired, nor on said date, nor thereafter at any time did the said defendant furnish to petitioners any shipping instructions or assortments for the said sugars.

25. The market price of the sugar purchased by defendant from petitioners under the two contracts aforesaid, at the time and place of the delivery thereof under the terms of the contract, was eleven (11) cents per pound.

26. The difference between the contract price for the said three hundred (300) barrels of sugar, which the said defendant failed and refused to accept, and the market price thereof at the time and place of delivery, was the sum of $15,225.00.

27. That on account of the failure of the defendant to accept the one hundred and fifty (150) barrels of sugar for which it had given shipping instructions, and which petitioners shipped in accordance with such instructions, petitioners incurred certain items of expense for freight which it prepaid, switching, demurrage, storage and unloading, aggregating the sum of $235.60, an itemized statement of said expenses being hereto attached, marked "Exhibit D" and made a part hereof.

Wherefore, petitioners aver that the said defendant is indebted to them in the said sum of Ffteen Thousand, Two Hundred and Twenty-five ($15,225.00) Dollars, representing the loss sustained by petitioners by reason of the failure of the said defendant to take and pay for the said sugar, and in the further sum of Two Hundred Thirty-five and 60/100 ($235.60) Dollars for expenses incurred as hereinbefore recited, and petitioners pray judgment against the said defendant for the said aggregate sum of Fifteen Thousand, Four Hundred Sixty and 60/100 ($15,460.60) Dollars, as well as for all lawful interest thereon at the rate of seven per cent (7%) per annum.

[fol. 13] And petitioners further pray that process may issue requiring the said defendant, The A. B. Small Company, to be and appear at the next term of this court to answer petitioners' complaint.

Jones, Park & Johnston, Petitioners' Attorneys.

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[fol. 14] EXHIBIT A TO PETITION

Contract No. 672

New York, N. Y., April 30, 1920.

Sold by Lamborn & Company, New York, for the Account of Whom It May Concern

Sold to A. B. Small Co., Macon, Ga., 150 Barrels Standard Fine Granulated Sugar, on the basis of 25.50 cents per pound, f. o. b. Savannah Refinery, Port Wentworth, Ga., for Fine Granulated "Shipments to be made some time during the period between July 15th and October 1, 1920; but shipping is to be at sellers' option," subject to delay, if any.

Terms.—Cash before delivery less 2%, or cash in seven days less 2%. Terms and withdrawals subject to the approval of the sellers' Credit Department.

Sellers to furnish sugars packed in barrels or bags, but sellers have option of shipping no more than 50% of contract in 100-lb. bags. Sellers will furnish 2-, 5-, 10- and 25-lb. bags at the ruling differential above Fine Granulated basis, if desired by the trade, provided these packages are obtainable, but do not guarantee to furnish said packages.

Sellers will not be responsible under this contract if shipment is prevented or delayed by war conditions, strikes, labor difficulties, accidents, embargoes, regulations or restrictions imposed by any Government or Governmental agencies, fire or any other cause beyond the sellers' control, or if the supply of raw material of the

refinery manufacturing the sugar described in this agreement shall be interrupted by any such cause.

Option of routing is reserved by sellers. Delivery will be considered complete on receipt of goods by carrier.

This purchase to be invoiced and paid for at contract price. No allowances whatever for declines in market. If shipment is made freight prepaid, the ruling prepaid freight basis to destination in effect on date of shipment will govern. Assortments against contract must be furnished when called for by sellers. All additional import duties, excise or other taxes hereafter levied on the Raw or Refined Sugar necessary to fill this contract at buyer's expense in addition to price specified.

Kindly sign and return one copy confirming purchase.

Lamborn & Company, Savannah, Ga., Brokers.

This contract is accepted: (buyer) (Sgd.) A. B. Small Co.

This contract is accepted. (Seller) Lamborn & Company, New York, N. Y., By (Sgd.) G. G. Bond

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[fol. 15] EXHIBIT B TO PETITION

Contract No. 1080

New York, N. Y., May 7, 1920.

Sold by Lamborn & Company, New York, for the Account of Whom It May Concern

Sold to A. B. Small Company, Macon, Ga., 300 Barrels Standard Fine Granulated Sugar on the basis of 25.50 cents per pound, f. o. b. Savannah Refinery, Port Wentworth, Georgia, for Fine Granulated. Delivery of equal quantities monthly beginning the last half of July and continuing through August and September of 1920, if possible. "Sellers' option of shipping to suit sellers' convenience during the period mentioned," subject to delay, if any.

Terms.—Cash before delivery less 2%, or cash in seven days less 2%. Terms and withdrawal subject to the approval of the sellers' Credit Department.

Sellers to furnish sugars packed in barrels or bags, but sellers have option of shipping no more than 50% of contract in 100-lb. bags. Sellers will furnish 2-, 5-, 10- and 25-lb. bags at the ruling differential above Fine Granulated basis, if desired by the trade, provided these packages are obtainable, but do not guarantee to furnish said packages.

Sellers will not be responsible under this contract if shipment is prevented or delayed by war conditions, strikes, labor difficulties, accidents, embargoes, regulations or restrictions imposed by any

Government or Governmental agencies, fire, or any other cause beyond the sellers' control, or if the supply of raw material of the refinery manufacturing the sugar described in this agreement shall be interrupted by any such cause.

Option of routing is reserved by sellers. Delivery will be considered complete on receipt of goods by carrier.

This purchase to be invoiced and paid for at contract price. No allowance whatever for declines in market. If shipment is made freight prepaid, the ruling prepaid freight basis to destination in effect on date of shipment will govern. Assortments against contract must be furnished when called for by sellers. All additional import duties, excise or other taxes hereafter levied on the Raw or Refined Sugar necessary to fill this contract at buyer's expense in addition to price specified.

Kindly sign and return one copy confirming purchase.

Lamborn & Company, Savannah, Ga., Brokers.

This contract is accepted: (Buyer) by (Sgd.) The A. B. Small Co.

This contract is accepted: (Seller) Lamborn & Company, by (Sdg.) J. G. Faril.

[fol. 16]

EXHIBIT C TO PETITION

Lamborn & Co.

Refined Sugar Department

United States Food Administration License Number G-42306

In Account with A. B. Small Co., Macon, Ga.

New York, Savannah, New Orleans, Chicago, Philadelphia, Havana, Cuba; Cienfuegos, Cuba; Kansas City

Savannah, Ga., January 22, 1920.

Statement Covering Resale of Sugars Not Taken by A. B. Small Co. in Accordance with Terms and Conditions of Contracts.—Contracts Numbers 672 and 1080

October 12th, 1920—Resale Applying Against Contracts 672, 1080, Sold to Kingman & Everett, Macon, Ga.—Car Southern 335,982

| Bbls. | Bags | Packages | | | Pounds | Price | Amount | |
|---|---|---|---|---|---|---|---|---|
| 25 | ... | ..... | Dixie | Crystals..... | 8,792 | 25.769 | 2,265.61 | |
| .. | 87 | Bulk | " | " ..... | 8,700 | 25.755 | 2,240.69 | |
| 50 | ... | ..... | " | " ..... | 17,551 | 25.769 | 4,522.72 | |
| .. | 175 | Bulk | " | " ..... | 17,500 | 25.755 | 4,507.13 | |
| | | | | | | | | ..... 13,536.15 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 75 | ... | ..... | Dixie Crystals..... | 26,343 | 11.36 | 2,992.56 | | |
| .. | 262 | Bulk | " " ..... | 26,200 | 11.36 | 2,976.32 | | |
| | | | | | | 5,968.88 | | |
| | | Less Exchange ..... | | | | 5.97 | | |
| | | **Net Realized** ..... | | | | | 5,962.91 | |
| | | Switching ..... | | | | 6.70 | | |
| | | Demurrage ..... | | | | 53.00 | | |
| | | Storage ..... | | | | 37.09 | | |
| | | Unloading & Delivering ..... | | | | 5.00 | | |
| | | | | | | | ..... | 101.79 |

EXHIBIT C TO PETITION—Continued

November 18th, 1920—Resale Applying Against Contracts 672, 1080, Sold to Kingman & Everett, Macon, Ga.—Car, D. & H. 21351

| Bbls. | Bags | Packages | | | Pounds | Price | Amount | |
|---|---|---|---|---|---|---|---|---|
| 40 | ... | ..... | Dixie | Crystals..... | 13,949 | 25.837 | 3,604.00 | |
| .. | 250 | Bulk | " | " ..... | 25,000 | 25.818 | 6,454.50 | |
| .. | 50 | 4/25s | " | " ..... | 5,000 | 26.018 | 1,300.90 | |
| .. | 60 | 10/10s | " | " ..... | 6,000 | 26.118 | 1,567.08 | |
| .. | 25 | 20/5s | " | " ..... | 2,500 | 26.218 | 655.45 | |
| | | | | | | | | ..... 13,581.93 |
| 40 | ... | ..... | " | " ..... | 13,949 | 11.25 | 1,569.26 | |
| .. | 250 | Bulk | " | " ..... | 25,000 | 11.25 | 2,812.50 | |
| .. | 50 | 4/25s | " | " ..... | 5,000 | 11.45 | 572.50 | |
| .. | 60 | 10/10s | " | " ..... | 6,000 | 11.55 | 693.00 | |
| .. | 25 | 20/5s | " | " ..... | 2,500 | 11.65 | 291.25 | |
| Freight as per prepaid Expense Bill..... | | | | | ..... | ..... | 160.42 | |
| Plus 3% War Tax on Freight..... | | | | | ..... | ..... | 4.80 | |
| | | | | | | | 6,103.73 | |
| Less Exchange ..... | | | | | | | 6.10 | |
| Net Realized ..... | | | | | | | | 6,097.63 |

| | | |
|---|---|---|
| Storage | ..... | 41.95 |
| Cost Telegrams & Telephone | ..... | 16.86 |
| Balance Due | 15,218.14 | |
| | 27,278.68 | 27,278.68 |

NOTICE.—This invoice must be remitted in full. If for any reason you claim reduction on any of the foregoing charges, send full itemized statement to claim department for adjustment. This invoice is payable to Lamborn & Company in exchange on New York or funds at par in Savannah.

[fol. 17] EXHIBIT D TO PETITION

Lamborn & Company in Account with the A. B. Small Company.

Shipment Against Contracts #672 and #1080 in Compliance with Instructions from the A. B. Small Company by Telegram Dated August 27, 1920

| | |
|---|---|
| Freight prepaid | $136.81 |
| Switching | 6.70 |
| Demurrage | 53.00 |
| Storage | 37.09 |
| Unloading and delivery | 5.00 |
| | $235.60 |

[File endorsement omitted.]

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[fol. 18] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

DEMURRER—Filed April 30, 1921

To the Honorable the District Court of the United States for the Western Division of the Southern District of Georgia:

Comes now the above named defendant, The A. B. Small Co., and demurs to the complaint herein, and for grounds of demurrer specifies:

First Count

1. The said petition fails to set forth facts sufficient to constitute a cause of action against this defendant.

2. The alleged contracts sued on and exhibited in the said plaintiff's petition are unilateral, lacking in mutuality and do not constitute any obligations on the part of either of the parties named therein.

3. It appears from said petition that the said alleged contracts are wholly lacking in consideration and are without consideration and are nudum pactum and void.

4. It appears from plaintiff's petition and exhibits A and B attached thereto "Terms and withdrawals subject to the approval of seller's credit department," and it does not appear that said credit department ever approved in writing and notified defendant of said terms and withdrawals. Wherefore, no contract was ever made and the seller was never bound.

5. Said alleged contracts are indefinite, uncertain and do not [fol. 19] bind the plaintiff, for it appears therefrom that the seller was not responsible if the "refiner manufacturing sugar" should be interrupted because of the named conditions in the alleged contracts, and the alleged agreements fail to state what refiner was manufacturing or to manufacture the sugar, leaving it to the will, wish or desire of the plaintiff to select any refiner as the refiner manufacturing the sugar and selecting a refiner who had no sugar if prices had advanced.

6. Said alleged contracts sued on herein and set up as Exhibits "A" and "B" to the plaintiff's petition are null and void and of no biding force and effect, for that it appears therefrom, and from all of the provisions thereof, that there were no substantial and binding promises made by the plaintiff to the defendant, and it further appearing that said alleged contracts are so indefinite and so limited by exceptions that they constitute no valid consideration for any promises of the defendant, and the said alleged contracts imposed no legal binding obligations on the plaintiff to sell and deliver the said sugar nor deliver the same at any certain time, and the many exceptions appearing therein to excuse the seller rob the said contracts as to the seller's obligation thereunder of any binding and legally enforce-able obligations, and would leave the defendant without remedy in the event of non-performance of the said plaintiff.

7. Defendant demurs specially to the 5th paragraph of the said petition as containing a conclusion of the pleader as to the effect of the terms of said alleged contract.

8. Defendant specially demurs to the 6th paragraph of said petition as undertaking to construe the terms of the said written instrument, and because said paragraph misquotes the provision of said contract therein referred to.

[fol. 20] 9. Defendant demurs specially to the 8th paragraph of the said petition as containing a conclusion of the pleader as to the effect of the terms of said alleged contract.

10. Defendant specially demurs to the 9th paragraph of said petition as undertaking to construe the terms of said written instrument in accordance with the language set forth in said 9th paragraph of said petition, the provision "seller's option of shipping to suit seller's convenience", showing by its terms that the seller had the option of shipping or not shipping said sugar.

11. Defendant demurs specially to the 10th paragraph of said petition as an attempt on the part of the plaintiff to construe the language of said written contracts as to the terms of payment, whereas the said written alleged contracts provided distinctly "terms and withdrawals subject to the approval of the seller's credit department".

12. Defendant specially demurs to the 11th paragraph of said petition as an attempt on the part of the plaintiff to construe the

terms of part of said alleged contracts and to confine the alleged meaning of the contracts to a condition to which it does not apply.

13. Defendant demurs specially to the 12th paragraph of said petition as containing a conclusion of the pleader as to the effect of the "general custom and usage" prevailing in the sugar business.

14. Defendant demurs specially to the 13th paragraph of the said petition as containing a conclusion of the pleader as to the effects of the terms of said alleged contract.

15. Defendant demurs to the 16th paragraph of said petition on the ground that the same fails to state the time when said petitioner requested and the defendant furnished shipping instructions and assortments for the August shipments.

[fol. 21] 16. Defendant demurs to the 17th paragraph of said petition on the ground that the same fails to allege the time when the said plaintiff forwarded 150 barrels of sugar, or the date of the shipping instructions given by defendant.

17. Defendant demurs to the 18th paragraph of said petition on the ground that the same fails to allege the time when the said sugar arrived and the time when the defendant refused to accept the same, receive or pay for the same and the time when the defendant notified the plaintiff that it would not accept the same; and the said paragraph fails to allege the time when the defendant notified the plaintiff that it would not give further shipping instructions or assortments nor the time when the defendant directed the plaintiff not to ship additional sugar.

18th. Defendant specially demurs to the 20th paragraph of said petition because the same fails to set forth the date when the plaintiff requested shipping instructions and assortments from the defendant and when the latter failed to give such information.

19. Defendant demurs to the 21st paragraph of said petition as to the decline of the market value of sugar as being irrelevant and immaterial.

20. Defendant demurs to the allegations of the 22nd paragraph of said petition for the same fails to allege when the plaintiff notified the defendant of its readiness to ship and requested shipping instructions and assortments, and fails to allege when notice was given of intention to sell said sugar.

21. Defendant demurs to the allegations of the 23rd par. of said petition on the ground of its not alleging when the defendant denied liability to the plaintiff nor when it failed to furnish shipping instructions and assortments.

22. Defendant demurs to the 25th par. of said petition on the ground that the language "with reasonable promptness after Oc-[fol. 22] tober 1st, 1920, your petitioner resold said 300 barrels of sugar" contains a conclusion of the pleader and fails to set forth

and allege the date when said alleged resale for account of the defendant was made. The said par. fails to allege when notice was given of its intention to resell and of the price and when it gave an opportunity to defendant to furnish a better bid.

23. Said petition in Count 1 thereof shows no cause of action against defendant, for it appears from said Count 1 and Count 2 of the petition that plaintiff seeks to recover both for a difference between the market price and the alleged purchase price and for the difference between the claimed resale price and the alleged purchase price.

Wherefore, said defendant prays that said plaintiff take nothing by its said action, and that it be hence dismissed with its cost herein expended.

Second Count

(Paragraphs 1 thru 19 identical with corresponding paragraphs of first count.)

20. Defendant demurs to the allegations of the 22nd paragraph of said petition for the same fails to allege when the plaintiff notified the defendant of its readiness to ship and requested shipping instructions and assortments.

21. Defendant demurs to the allegations of the 23rd par. of said petition on the ground of its not alleging when the defendant denied liability to the plaintiff nor when it failed to furnish shipping instructions and assortments.

22. Defendant demurs specifically to the 25th par. of said petition as containing a conclusion of the pleader as to the market price of the sugar at the time and place of delivery called for under the terms of the alleged contracts.

23. Defendant demurs to the 26th par. of said petition because the same fails to state when defendant failed and refused to accept said [fol. 23] sugar, and because said par. contains a conclusion of the pleader as to the difference between the alleged contract price and the market price of said sugar at an alleged unstated time and place of delivery.

24. Defendant demurs to the 27th par. because same fails to set forth the date when the defendant furnished shipping instructions or the date when plaintiff shipped in accordance with such instructions or the date when defendant failed to accept said sugar.

25. Said petition in Count 2 thereof shows no cause of action against defendant for that it appears from said Court 2 and Count 1 of the petition that the plaintiff seeks to recover both for a difference between the market price and the alleged purchase price and for the difference between the claimed resale and the alleged purchase price.

Wherefore, said defendant prays that said plaintiff take nothing by its said action and that it be hence dismissed with its cost herein expended.

(Signed) Saussy & Saussy, Savannah, Ga., Watkins, Russell & Asbill, Atlanta, Ga., Attorneys for Defendant.

Jurat showing the foregoing was duly sworn to by Edgar Watkins, omitted in printing.

[File endorsement omitted.]

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[fol. 24] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

AMENDMENT TO PETITION—Filed May 14, 1921

Now come the plaintiffs and move to amend their petition heretofore filed in the above case, by adding thereto the following allegations:

First Count

1. At the end of paragraph 10 of the First Count of said petition the following words:

"Under both of said contracts, withdrawals of sugar were subject to the approval of the seller's department. The word 'withdrawals' when used in contracts for future delivery of sugar, as used in the sugar trade at the time said contracts were made, had a definite and specific trade meaning, indicating the amounts or quantities of sugar that might be ordered out by the buyer at any one time and removal from the entire lot contracted for. The contracts were for the sale of a large quantity of sugar for future delivery, the buyer having the right from time to time to withdraw or order out specific quantities within the contract period for delivery. Such withdrawals were to be subject to the approval of the credit department of the seller."

Second Count

1. At the end of paragraph 10 of the Second Count of said petition, the following words:

[fol. 25] "Under both of said contracts, withdrawals of sugar were subject to the approval of the seller's credit department. The word 'withdrawals' when used in contracts for future delivery of sugar, as used in the sugar trade at the time said contracts were made, had a definite and specific trade meaning, indicating the amounts or quantities of sugar that might be ordered out by the buyer at any one time and removed from the entire lot contracted for. The contracts

were for the sale of a large quantity of sugar for future delivery, the buyer having the right from time to time to withdraw or order out specific quantities within the contract period for delivery. Such withdrawals were to be subject to the approval of the credit department of the seller."

Wherefore, plaintiffs pray that this amendment be allowed as a part of their said petition.

Jones, Park & Johnston, Plaintiffs' Attorneys.

[File endorsement omitted.]

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[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

AMENDMENT TO PETITION—Filed May 20, 1921

Now comes Lamborn & Company, the plaintiffs in the above stated case, and, by leave of the court first had, amend their petition in the following particulars:

First Count

1. By adding to the 16th paragraph of the first count of said petition the following:

"Such request was made in writing on August 25, 1920; shipping instructions and assortments were furnished on August 27, 1920."

2. By inserting between the word "sugar" and the word "in" in the second line of the 17th paragraph of the first count of said petition the following:

"On August 30, 1920."

3. By adding to the 18th paragraph of the first count of plaintiffs' petition the following:

"Said sugar arrived and said defendant refused to accept the same on September 6, 1920. The notices given by defendant to plaintiffs were on September 7, 1920."

4. By adding to the 20th paragraph of the first count of plaintiffs' petition the following:

"Such requests were made in writing on September 18th and September 27th, 1920."

5. By adding to the 22nd paragraph of the first count of plaintiffs' petition the following:

"Such requests were made in writing on September 18th and September 27th, 1920."

6. By adding to the 23rd paragraph of the first count of plaintiff's petition the following:

"Such denials of liability and refusal to furnish shipping instructions and assortments were made on September 9th, September 13th and October 15th, 1920."

[fol. 27] Second Count

1. By adding to the 16th paragraph of the second count of said petition the following:

"Such request was made in writing on August 25, 1920; shipping instructions and assortments were furnished on August 27, 1920."

2. By inserting between the word "sugar" and the word "in" in the second line of the 17th paragraph of the second count of said petition the following:

"On August 30, 1920."

3. By adding to the 18th paragraph of the second count of plaintiffs' petition the following:

"Said sugar arrived and said defendant refused to accept the same on September 6, 1920. The notices given by defendant to plaintiffs were on September 7, 1920."

4. By adding to the 20th paragraph of the second count of plaintiffs' petition the following:

"Such requests were made in writing on September 18th and September 27th, 1920."

5. By adding to the 22nd paragraph of the second count of plaintiffs' petition the following:

"Such requests were made in writing on September 18th and September 27th, 1920."

6. By adding to the 23rd paragraph of the second count of plaintiffs' petition the following:

"Such denials of liability and refusal to furnish shipping instructions and assortments were made on September 9th, September 13th and October 15th, 1920."

Jones, Park & Johnston, Hitch, Denmark & Lovett, Attorneys for Plaintiffs.

The foregoing amendment is hereby allowed, this May 19, 1921.
Beverly D. Evans, United States Judge.

[File endorsement omitted.]

[fol. 28] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

DEMURRER TO AMENDED PETITION—Filed May 16, 1921

The plaintiff having submitted an amendment to its petition and defendant now comes and renews the grounds of demurrer originally filed by it in this case, and also for additional grounds of demurrer, says:

First Count

1. That the said amendment seeks to vary the written terms of the said original contracts sued on, in so far as it seeks to attach to the words "withdrawals subject to the approval of seller's credit department," a different meaning from their plain, ordinary meaning, and to make the said words mean something different from their plain and ordinary meaning.

2. Because the said petition as amended fails to set forth facts sufficient to constitute a cause of action against this defendant.

Second Count

1. The said amendment seeks to vary the written terms of the said alleged contracts sued on, in so far as it seeks to attach to the words "withdrawals subject to the approval of seller's credit department," a different meaning from their plain, ordinary meaning, and to make the said words mean something different from their plain and ordinary meaning."

2. Because the said petition as amended fails to set forth facts sufficient to constitute a cause of action against this defendant.

Wherefore it prays that the said demurrer be sustained.
Watkins, Russell & Asbill, Saussy & Saussy, Counsel for Defendant.

[File endorsement omitted.]

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[fol. 28½] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

ORDER OVERRULING DEMURRER—Filed May 20, 1921

The demurrer filed by the defendant to the plaintiff's petition in the above stated case having come on regularly for hearing, and

having been fully argued by counsel for plaintiffs and defendant, and the plaintiffs having amended their petition to meet the special demurrer filed.

It is considered, ordered and adjudged that said demurrer be, and the same is, hereby overruled.

This the 19th day of May, 1921.

Beverly D. Evans, United States Judge.

[File endorsement omitted.]

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[fol. 29] In the District Court of the United States for the Western Division of the Southern District of Georgia

[Title omitted]

Answer—Filed April 30, 1921

Now comes the A. B. Small Company, in the above entitled cause, and answering the complaint of the plaintiff in said action respectfully shows:

First Count

1. For want of sufficient information defendant can neither admit nor deny the allegations of the 1st paragraph of said petition.

2. Defendant admits the allegations of the 2nd paragraph of said petition.

3. Answering paragraph 3 of said petition, defendant admits that it is a citizen of the State of Georgia; for want of sufficient information defendant can neither admit nor deny the citizenship of the plaintiff; defendant denies that it is indebted to the plaintiff in any amount.

4. Answering paragraph 4, defendant admits the signing of a writing, Exhibit A attached to said petition, but denies that such writing constituted an enforceable contract or gave rise to any cause of action as claimed by the plaintiff.

5. Defendant denies the allegation contained in the 5th paragraph of said petition. No sale or purchase was made as therein alleged. The alleged contract is not a mutually binding contract, and for the reasons hereinafter pleaded, is not enforc-able against the defendant.

6. The defendant denies the allegation of the 6th paragraph of said petition. There never was any binding obligation on the plaintiff to ship any sugar to defendant nor was there ever any binding [fol. 30] obligation on defendant to accept shipments of any sugar from the said plaintiff.

7. Answering paragraph 7 defendant admits the signing of the writing, Exhibit B attached to said petition, but denies that such

writing ever constituted an enforc-able contract or gave rise to any cause of action as claimed by the plaintiff.

8. Defendant denies the allegations contained in the 8th paragraph of said petition. No sale or purchase was made as therein alleged. The said alleged contract is not a mutually binding contract, and for the reasons hereinafter pleaded is not enforcible against the defendant.

9. Defendant denies the allegations of the 9th paragraph of said petition. There was never any binding obligation on the plaintiff to ship any sugar to defendant, nor was there ever any binding obligation on defendant to accept shipments of any sugar from the said plaintiff.

10. Defendant denies the allegations of the 10th paragraph of said petition, the terms of said alleged contracts distinctly providing that "Terms and withdrawals subject to the approval of the seller's credit department," and defendant shows that the plaintiff has never assented to any approval of any such terms and withdrawals.

Nor has plaintiff, so far as this defendant knows, ever accepted the proposed contract by approving the terms and withdrawals and plaintiff has never at any time notified this defendant of its acceptance of said contract by such approval. The failure so to accept in writing and to notify the defendant ther-of, prevents said writing from becoming a contract and leaves the plaintiff unbound thereunder, said alleged contract being lacking in mutuality, without consideration, and violative of the statute of frauds. Defendant further shows that assent was necessary on the part of plaintiff and should have been in writing signed by the plaintiff and the defendant or some one lawfully authorized by each of them, and that no approval was signed by plaintiff or by any one authorized by it, nor was any [fol. 31] writing accepting any such terms ever signed by defendant or any one by it authorized.

11. Defendant denies the allegations of the 11th paragraph of said petition. The "Terms and withdrawals" were both subject to the seller's credit department's approval, and defendant was for the reasons hereinbefore and hereinafter pleaded, never bound to designate any number of packages, barrels or bags, and never assented to any obligation to accept any sugar under the terms of said alleged agreement, nor have plaintiffs, so far as the defendant knows, ever accepted the proposed contract by approving the terms and withdrawals and plaintiffs have never at any time notified the defendant of the plaintiffs' acceptance of said contract by such approval. The failure so to accept in writing and to notify defendant thereunder, prevents the said alleged contract from becoming a contract and leaves the plaintiff unbound thereunder, said alleged contract being lacking in mutuality, without consideration, and in violation of the statute of frauds.

12. Answering paragraph 12 of said petition defendant denies that said alleged contracts are mutually binding contracts, and says that

for the reasons hereinafter pleaded said contracts are not enforce-able against the defendant. Defendant denies that plaintiff contracted to sell or that defendant contracted to buy any sugar under the alleged contract. For want of sufficient information defendant can neither admit nor deny the general customs in the sugar business alleged in said paragraph, but denies that any such customs, if any ever existed is binding on it.

13. Answering paragraph 13 of said petition, defendant denies that the two alleged contracts are mutually binding contracts and says said contracts are for the reasons hereinbefore and hereinafter pleaded not enforce-able against the defendant.

Defendant denies that any sales were made or that any purchases were made as herein alleged. For want of sufficient information defendant can neither admit nor deny the allegations of the petition relating to the freight rates from Port Wentworth to Macon, Ga.

14. Defendant denies the allegations contained in the 14th para- [fol. 32] graph of said petition. The alleged contract is not a mutually binding contract and for the reasons hereinbefore and hereinafter pleaded is not enforce-able against the defendant.

15. Defendant denies the allegations contained in the 15th paragraph of said petition. No shipping instructions under any valid contract were given by defendant, nor did defendant receive any sugar under any valid contract with the plaintiff. Said alleged contract did not create binding obligations on the plaintiff or defendant for the reasons already and hereinafter stated, which reasons were unknown to defendant when said sugar was taken and paid for.

16. Defendant denies the allegations contained in the 16th paragraph of said petition. No shipping instructions under any valid contract were requested by plaintiffs nor any furnished by defendant, but shipment was made over the protest of defendant. Said alleged contracts are not mutually binding contracts, and for the reasons herein pleaded, not enforce-able against the defendant, as fully appears from facts in this answer fully pleaded, and then unknown to defendant.

17. Defendant denies the allegations contained in the 17th paragraph of said petition.

Defendant denies that there were any legal mutually binding contracts which obligated plaintiff to ship any sugar to defendant or which obligated defendant to furnish any shipping instructions to plaintiff.

18. Defendant admits that it refused to accept the sugar as stated in paragraph 18 of said petition, but denies that there was any binding agreement on defendant to accept, receive or pay for any sugar, or any binding agreement on plaintiff to deliver any sugar. Said alleged contracts referred to herein are not mutually binding contracts for the reasons hereinafter pleaded, and not enforce-able against the defendant.

19. Answering paragraph 19 of said petition, defendant denies that it was under any binding agreement to accept and pay for any sugar under the alleged contracts and denies that it was under any [fol. 33] duty to give instructions or assortment for any sugar covered by said alleged contracts, and denies that said alleged contracts are mutually binding, but says for the reasons herein pleaded said contracts are not enfore-able against the defendant.

20. Defendant denies the allegations of the 20th paragraph of said petition to the effect that the plaintiff requested shipping instructions from the defendant during the period provided in the agreement, as the defendant denies that there ever was a contract between the plaintiff and the defendant. The defendant states that the alleged agreements bear dates April 30th and May 7th, 1920, and that on or about August 26th, 1920 after sugar had declined in price below the price specified in the said alleged agreements of April 30th and May 7th, the said plaintiff asked for assortments from defendant, but never informed the defendant that the seller's credit department had ever approved of any terms or withdrawels, and that the delay from April 30th and May 7th to August 26th, 1920 was an unreasonable time for the said plaintiff to have waited before requesting any instructions, and the said defendant was never under any obligation to furnish any instructions to the plaintiff in the premises.

21. Answering paragraph 21 of said petition defendant admits that sugar declined in price between the dates of April 30th and May 7th and September and October 1st, 1920, but deny that there was any binding agreement of defendant to accept any sugar or any binding agreement on plaintiff to deliver any sugar.

22. Answering paragraph 22 of said petition, defendant denies "Notice within the contract time" being given to it, as defendant denies there ever was any binding contract. Defendant admits that on August 26th, 1920 the plaintiff wired asking for shipping instructions and admits that the defendant did not give any instructions because it was not obligated to do so. The defendant on August 27, 1920 and on later dates notified plaintiff that the defendant was not under any obligation to purchase any sugar from the plaintiff.

[fol. 34] 23. Answering paragraph 23 of the petition defendant denies that they ever were bound to furnish any shipping instructions and admits that it failed to do so. Defendant denies that there were any contracts or any liability thereunder by defendant to plaintiff.

24. Answering paragraph 24 of said petition, defendant admits that it never furnished any shipping instructions and denies the allegations that there were contracts which required it to do so. On the contrary, there never were any mutually binding contracts between the plaintiff and the defendant for the reasons herein set forth.

25. Answering paragraph 25 of said petition, defendant denies the allegation "with reasonable promptness after October 1st, 1920,

your petitioner re-sold the said 300 barrels of sugar for the account of the said defendant". Defendant admits receiving from plaintiff a letter on or about October 16th, 1920 to the effect that plaintiff had wired on October 15th, 1920 that they would sell certain sugars unless they received a better offer before 9 A. M., October 16th, 1920. Defendant for want of sufficient information can neither admit nor deny that the plaintiff re-sold 300 barrels of sugar for the account of defendant in the manner and form as alleged and denies plaintiff's authority to make any such sale for the account of defendant.

26. Answering paragraph 26 of said petition, defendant admits that it never made any bid for any sugar.

27. For want of sufficient information defendant denies the allegations of the 27th paragraph of said petition; denies any indebtedness of any kind to the plaintiff on any kind of account or otherwise, and demands strict proof of any of said obligations. Defendant admits that it received a copy of said statement but immediately denied and now denies any liability thereunder.

28. Defendant denies the allegations of the 28th paragraph of said petition; denies that there were any legal binding contracts be- [fol. 35] tween plaintiff and defendant.

29. And the defendant further shows that prior to the requiring of any contracts of the like form to that sued on in the case at bar, and for a long term of years prior to the date of the said alleged contracts, it had been the practice of the plaintiff to sell to jobbers and others in Georgia and elsewhere, without requiring more than a simple order and acceptance, and it was not until about the time of the signing of the said alleged contract sued on, that the plaintiff demanded that the said form of contract be signed by any and all customers or persons ordering sugar from or through it. And the plaintiff at and about the time the said alleged contracts were signed in 1920, commenced to speculate with sugar, and it had prepared and had signed many of the said forms of alleged contract, the said plaintiff purposely and intentionlly and for its own purposes and protection inserted the said clause "Terms and withdrawals subject to the approval of the seller's credit department" in order to safeguard itself as against any rise in prices of sugar before and at times for delivery, and it was the purpose and object of the said plaintiff to provide, as appears from the terms of the said alleged contracts, that such writings would not bind it legally to any engagement in the event sugar prices went beyond the prices fixed in the said alleged contract, and so that the plaintiff could exercise its own arbitrary wish and will in deciding whether or not it would perform its part of the said alleged contract. At and before the time for delivery of sugar under the said alleged contract, and in all other contracts entered into by the plaintiff with many jobbers and others in Georgia and elsewhere, sugar prices fell decidedly below that specified in the said alleged contracts, and the plaintiff, for its own advantage, has undertaken to hold not only the defendant but all others who have refused to accept sugar, to the said alleged contracts.

[fol. 36] 30. For further special answer herein defendant says that heretofore, and for a long period of years, plaintiff has been engaged as a broker, representing principals in the sale of sugar, and just prior to the making of the alleged contracts sued on herein, plaintiff conspired, combined and confederated with Savannah Sugar Refining Company, and other refiners of sugar, whose names defendant does not know, for the purpose of restricting interstate trade and competition in the sale of sugar throughout the states of Florida, Alabama, Georgia, South Carolina and North Carolina and other states. In pursuance of such conspiracy, and in order unduly to increase the prices of sugar in interstate commerce, plaintiff and said Savannah Sugar Refining Corporation and other sugar refineries agreed among themselves that the method of conducting the refining and selling of sugar in interstate commerce in said states and other states of the Union, theretofore employed by said plaintiff and said refiners should be changed and that in lieu of making needed allotments of sugar to wholesale grocers in said states, in proportion to the needs of said grocers and in proportion that the supply of sugar bore to such needs, to adopt the plan of partially discontinuing allotments and of requiring contracts for future delivery of sugar. In further pursuance of such conspiracy, combination and confederation, plaintiff and its confederates, all the names of whom being known to plaintiff but unknown to this defendant, aforesaid agreed among themselves that the refineries should notify wholesale grocers, defendant and others that they were unable to make full allotments, and that plaintiff, theretofore brokers, should become sellers and should buy raw sugars, or pretent to buy raw sugars to the end that the refiners would be without sugar, or pretend to be without sugar, leaving the sale of the principal amounts of sugar to plaintiff and other brokers confederated with it. Carrying out this conspiracy, the Savannah Refining Corporation, a New York corporation, with its place of business in Savannah, Ga., declined to sell sugar to this defendant and other wholesale grocers in Georgia, [fol. 37] or to make allotments of sugar as theretofore, and plaintiff and said refinery and other refineries, in order to make effectual their conspiracy to restrain trade, adopted the plan of writing, telegraphing and orally stating to this defendant and to other wholesale grocers throughout the Southeast that there was a shortage of sugar, and that if defendant and other like wholesale grocers expected to obtain sugars, they should immediately make contracts therefor. Further carrying out said conspiracy and combination in restraint of trade, plaintiff and its confederates falsely stated that there was a shortage of sugar, when in truth and in fact there was an ample supply of sugar to meet the demands of all consumers and wholesale grocers and others using sugar. The plan was adopted in pursuance of said conspiracy of plaintiff buying or pretending to buy raw sugars in Cuba and elsewhere, which sugars were refined by the refiners confederated with plaintiff, and it was pretended that the sugar belonged to plaintiff. Whether plaintiff actually owned the sugar or only pretended to own it, is unknown to this defendant, but on information and belief, defendant says that the purpose of owning or pre-

tending to own the sugars on the part of plaintiff was to enable it and others to increase the prices of sugars beyond their fair value. Further carrying out the conspiracy aforesaid, plaintiff and its confederates witheld sugar from the market, stored it in the refineries and in Cuba and elsewhere, thus falsely convincing defendant and other wholesale grocers that there was a shortage of sugar, when in truth and in fact there was no such shortage. In pursuance of said conspiracy, plaintiff owning or controlling sugar which had cost it or those for whom they held the sugar, prices at or below 15¢ per lb. agreed with their confederates to make sales of sugar for July, August and September delivery during the year 1920 at the price of 25½¢ per lb., or other excessive prices, when a price of 15¢ or 16¢ would have been fully compensatory to the owners of said sugar. [fol. 38] By means of said conspiracy, the refiners sought to obtain and did contract to obtain for refining sugar, amounts three or four times as high as had ever been charged theretofore, and likewise higher than was just and reasonable, and plaintiff and others acting as brokers and refiners and confederated with plaintiff, obtained for itself by contract and otherwise, actual or prospective profits greatly in excess of any ever theretofore charged, and greater than were reasonable.

Further to give the appearance of a shortage and to make effective this conspiracy, plaintiff and its confederated conspirators made sales of sugar to speculators and others than those usually engaged in handling and dealing in sugar, thus enabling plaintiff and its confederates to make an unjust and unreasonable charge in handling and dealing in sugar, a necessary of life. By the means aforesaid, and by other means to defendant unknown, plaintiff succeeded in convincing the public and this defendant that there existed a shortage of sugar, and succeeded in restricting competition and increasing prices and in making contracts for unjust and unreasonable charges for selling and handling sugar, all in violation of the laws of the United States and especially of the anti-trust laws of the United States; and said contracts directly affected interstate commerce and were conspiracies in violation of the laws of the United Staets, the enforcement of which contracts in this case would be to make effectual such conspiracies.

The purpose, intent and direct effect of the acts of plaintiff aforesaid were to increase the prices of sugar, to restrain and restrict trade in interstate commerce, and falsely and fraudulently to convince defendant and other wholesale grocers and consumers throughout the United States that a shortage existed in the supply of sugar; thus inducing defendant and others to believe that contracts must be entered into at once at prices demanded by plaintiff. Defendant not knowing, nor having opportunity to know, the conditions which [fol. 39] plaintiff well knew, and relying on the acts, conduct and representations of plaintiff, signed the writings here sued on, which it would not have done had it known the true facts.

31. That the facts pleaded in paragraphs 29 and 30 hereof show false and fraudulent representations, which made voidable the alleged contracts sued on herein, and because thereof defendant here as heretofore disavows said so-called contracts.

Wherefore, defendant says that the alleged contracts sued on in this case are each and all unlawful, in violation of the statute and unenforce-able.

Wherefore, defendant prays that said action may be dismissed, and that it may have judgment for its costs.

Dated, April 30, 1921.

Saussy & Saussy, Savannah, Georgia; Watkins, Russell & Asbill, Atlanta, Georgia, Attorneys for Defendant.

Second Count

1. For want of sufficient information defendant can neither admit nor deny the allegations of the 1st paragraph of said petition.

2. Defendant admits the allegations of the 2nd paragraph of said petition.

3. Answering paragraph 3 of said petition, defendant admits that it is a citizen of the State of Georgia; for want of sufficient information defendant can neither admit nor deny the citizenship of the plaintiff; defendant denies that it is indebted to the plaintiff in any amount.

4. Answering paragraph 4, defendant admits the signing of a writing, Exhibit "A" attached to said petition, but denies that such [fol. 40] writing constituted an enforce-able contract or gave rise to any cause of action as claimed by the plaintiff.

5. Defendant denies the allegations contained in the 5th paragraph of said petition. No sale or purchase was made as therein alleged. The alleged contract is not a mutually binding contract, and for the reasons hereinafter pleaded, is not enforce-able against the defendant.

6. The defendant denies the allegation of the 6th paragraph of said petition. There never was any binding obligation on the plaintiff to ship any sugar to defendant nor was there ever any binding obligation on defendant to accept shipments of any sugar from the said plaintiff.

7. Answering paragraph 7 defendant admits the signing of the writing, Exhibit "B" attached to said petition, but denies that such writing ever constituted an enforce-able contract or gave rise to any cause of action as claimed by the plaintiff.

8. Defendant denies the allegations contained in the 8th paragraph of said petition. No sale or purchase was made as therein alleged. The said alleged contract is not a mutually binding contract, and for the reasons hereinafter pleaded is not enforce-able against the defendant.

9. Defendant denies the allegations of the 9th paragraph of said petition. There was never any binding obligation on the plaintiff to ship any sugar to defendant, nor was there ever any binding ob-

ligation on defendant to accept shipments of any sugar from the said plaintiff.

10. Defendant denies the allegations of the 10th paragraph of said petition, the terms of said alleged contracts distinctly providing that "Terms and withdrawals subject to the approval of the seller's credit department," and defendant shows that the plaintiff has never assented to any approval of any such terms and withdrawals.

Nor has plaintiff, so far as this defendant knows, ever accepted the [fol. 41] proposed contract by approving the terms and withdrawals, and plaintiff has never at any time notified this defendant of its acceptance of said contract by such approval. The failure so to accept in writing and to notify the defendant thereof, prevents said writing from becoming a contract and leaves the plaintiff unbound thereunder, said alleged contract being lacking in mutuality, without consideration, and violative of the statute of frauds. Defendant further shows that assent was necessary on the part of plaintiff and should have been in writing signed by the plaintiff and the defendant, or some one lawfully authorized by each of them, and that no approval was signed by plaintiff or by any one authorized by it, nor was any writing accepting any such terms ever signed by defendant or any one by it authorized.

11. Defendant denies the allegations of the 11th paragraph of said petition. The "Terms and withdrawals" were both subject to the seller's credit department's approval, and defendant was for the reasons hereinbefore and hereinafter pleaded, never bound to designate any number of packages, barrels or bags, and never assented to any obligation to accept any sugar under the terms of said alleged agreement, nor has plaintiff, so far as the defendant knows, ever accepted the proposed contract by approving the terms and withdrawals, and plaintiff has never at any time notified the defendant of the plaintiff's acceptance of said contract by such approval. The failure so to accept in writing and to notify defendant thereunder, prevents the said alleged contract from becoming a contract and leaves the plaintiff unbound thereunder, said alleged contract being lacking in mutuality, without consideration, and in violation of the statute of frauds.

12. Answering paragraph 12 of said petition, defendant denies that said alleged contracts are mutually binding contracts, and says that for the reasons hereinafter pleaded said contracts are not enforce-able against the defendant. Defendant denies that plaintiff contracted to sell or that defendant contracted to buy any sugar under the alleged contract. For want of sufficient information de- [fol. 42] fendant can neither admit nor deny the general customs in the sugar business alleged in said paragraph, but denies that any such customs, if any ever existed, are binding on it.

13. Answering paragraph 13 of said petition, defendant denies that the two alleged contracts are mutually binding contracts, and says said contracts are, for the reasons hereinbefore and hereinafter pleaded, not enforce-able against the defendant.

Defendant denies that any sales were made or that any purchases were made as herein alleged. For want of sufficient information defendant can neither admit nor deny the allegations of the petition relating to the freight rates from Port Wentworth to Macon, Georgia.

14. Defendant denies the allegations contained in the 14th paragraph of said petition. The alleged contract is not a mutually binding contract, and for the reasons hereinbefore and hereinafter pleaded is not enforce-able against the defendant.

15. Defendant denies the allegations contained in the 15th paragraph of said petition. No shipping instructions under any valid contract were given by defendant, nor did defendant receive any sugar under any valid contract with the plaintiff. Said alleged contract did not create binding obligations on the plaintiff or defendant for the reasons already and hereinafter stated, which reasons were unknown to defendant when said sugar was taken and paid for.

16. Defendant denies the allegations contained in the 16th paragraph of said petition. No shipping instructions under any valid contract were requested by plaintiff nor any furnished by defendant, but shipment was made over the protest of defendant. Said alleged contracts are not mutually binding contracts, and for the reasons herein pleaded not enforce-able against the defendant, as fully appears from facts in this answer fully pleaded, and then unknown to defendant.

17. Defendant denies the allegations contained in the 17th paragraph of said petition.

[fol. 43] Defendant denies that there were any legal mutually binding contracts which obligated plaintiff to ship any sugar to defendant or which obligated defendant to furnish any shipping instructions to plaintiff.

18. Defendant admits that it refused to accept the sugar as stated in paragraph 18 of said petition, but denies that there was any binding agreement on defendant to accept, receive or pay for any sugar, or any binding agreement on plaintiff to deliver any sugar. Said alleged contracts referred to herein are not mutually binding contracts for the reasons hereinafter pleaded, and not enforce-able against the defendant.

19. Answering paragraph 19 of said petition, defendant denies that it was under any binding agreement to accept and pay for any sugar under the alleged contracts, and denies that it was under any duty to give instructions or assortments for any sugar covered by said alleged contracts, and denies that said alleged contracts are mutually binding, but says, for the reasons herein pleaded, said contracts are not enforce-able against the defendant.

20. Defendant denies the allegations of the 20th paragraph of said petition to the effect that the plaintiff requested shipping instructions from the defendant during the period provided in the

agreement, as the defendant denies that there ever was a contract between the plaintiff and the defendant. The defendant states that the alleged agreements bear dates April 30th and May 7th, 1920, and that on or about August 26th, 1920, after sugar had declined in price below the price specified in the said alleged agreements of April 30th and May 7th, the said plaintiff asked for assortments from defendant, but never informed the defendant that the seller's credit department had ever approved of any terms or withdrawals, and that the delay from April 30th and May 7th to August 26th, 1920, was an unreasonable time for the said plaintiff to have waited [fol. 44] before requesting any instructions, and the said defendant was never under any obligation to furnish any instructions to the plaintiff in the premises.

21. Answering paragraph 21 of said petition, defendant admits that sugar declined in price between the dates of April 30th and May 7th and September and October 1st, 1920, but denies that *that* there was any binding agreement of defendant to accept any sugar or any binding agreement on plaintiff to deliver any sugar.

22. Answering paragraph 22 of said petition, defendant denies "Notice within the contract time" being given to it, as defendant denies there ever was any binding contract. Defendant admits that on August 26th, 1928, the plaintiff wired asking for shipping instructions, and admits that the defendant did not give any instructions because it was not obligated to do so. The defendant on August 27, 1920, and on later dates, notified plaintiff that the defendant was not under any obligation to purchase any sugar from the plaintiff.

23. Answering paragraph 23 of the petition, defendant denies that it ever was bound to furnish any shipping instructions and admits that it failed to do so. Defendant denies that there were any contracts or any liability thereunder by defendant to plaintiff.

24. Answering paragraph 24 of said petition, defendant admits that it never furnished any shipping instructions, and denies the allegations that there were contracts which required it to do so. On the contrary, there never were any mutually binding contracts between the plaintiff and the defendant for the reasons set forth.

25. Answering paragraph 25 of said petition, defendant denies that any sugar was bought by it or sold to it by plaintiff under the said alleged contracts, and says that there never were any mutually [fol. 45] binding contracts between plaintiff and defendant; for want of any sufficient information defendant can neither admit nor deny the market price of sugar at the unstated time and place of delivery under the terms of the alleged contracts, but requires strict proof thereof by plaintiff.

26. Defendant denies the allegations of the 26th paragraph of said petition, and denies that there were any legal and binding contracts or any liability thereunder by defendant to plaintiff.

27. Defendant denies the allegations of the 27th paragraph of said petition; denies that it was under any legal duty to accept the sugar therein mentioned, or that it ever furnished any shipping instructions covering the same, or that plaintiff did, or legally could, ship said sugar for defendant's account; for want of sufficient information defendant can neither admit nor deny the contents of the itemized statement referred to as Exhibit "D," but requires strict proof thereof by plaintiff. Defendant denies, as it has heretofore and before this suit was filed, that plaintiff could in any manner hold defendant responsible for any of the expenses enumerated in said paragraph, there being no mutually binding contract between plaintiff and defendant relating to the sugar in question.

28. And the defendant further shows that prior to the requiring of any contracts of the like form to that sued on in the case at bar, and for a long term of years prior to the date of the said alleged contracts, it had been the practice of the plaintiff to sell to jobbers and others in Georgia and elsewhere, without requiring more than a simple order and acceptance, and it was not until after the time of the signing of the said alleged contract sued on that the plaintiff demanded that the said form of contract be signed by any and all customers or persons ordering sugar from or through it. And the plaintiff at and about the time the said alleged contracts were signed in 1920, commenced to speculate with sugar, and it had prepared and [fol. 46] had signed many of the said forms of alleged contract, the said plaintiff purposely and intentionally and for its own purposes and protection inserted the said clause "Terms and withdrawals subject to the approval of the seller's credit department" in order to safeguard itself as against any rise in prices of sugar before and at times of delivery, and it was the purpose and object of the said plaintiff to provide, as appears from the terms of the said alleged contracts, that such writings would not bind it legally to any engagement in the event sugar prices went beyond the prices fixed in the said alleged contract, and so that the plaintiff could exercise its own arbitrary wish and will in deciding whether or not it would perform its part of the said alleged contract. At and before the time for delivery of sugar under the said alleged contract, and in all other contracts entered into by the plaintiff with many jobbers and others in Georgia and elsewhere, sugar prices fell decidedly below that specified in the said alleged contracts, and the plaintiff, for its own advantage, has undertaken to hold not only the defendant but all others who have refused to accept sugar, to the said alleged contracts.

29. For further special answer herein, defendant says that heretofore, and for a long period of years, plaintiff has been engaged as a broker, representing principals in the sale of sugar, and just prior to the making of the alleged contracts sued on herein, plaintiff conspired, combined and confederated with Savannah Sugar Refining Company, and other refiners of sugar, whose names defendant does not know, for the purpose of restricting interstate trade and competition in the sale of sugar throughout the States of Florida, Alabama, Georgia, South Carolina, North Carolina, and other States. In pursuance of such conspiracy, and in order unduly to increase

the prices of sugar in interstate commerce, plaintiff and said Savannah Sugar Refining Corporation, and other sugar refineries, agreed among themselves that the method of conducting the refining and selling of sugar in interstate commerce in said States and other [fol. 47] States of the Union, theretofore employed by said plaintiff and said refiners should be changed, and that in lieu of making needed allotments of sugar to wholesale grocers in said States, in proportion to the needs of said grocers and in proportion that the supply of sugar bore to such needs, to adopt the plan of partially discontinuing allotments and of requiring contracts for future delivery of sugar. In further pursuance of such conspiracy, combination and confederation, plaintiff and its confederates, all the names of whom being known to plaintiff but unknown to this defendant, aforesaid agreed among themselves that the refineries should notify wholesale grocers, defendant and others, that they were unable to make full allotments, and that plaintiff, theretofore brokers, should become sellers and should buy raw sugars, or pretend to buy raw sugars, to the end that the refiners should be without sugar, or pretend to be without sugar, leaving the sale of the principal amounts of sugar to plaintiff and other brokers confederated with it. Carrying out this conspiracy, the Savannah Sugar Refining Corporation, a New York Corporation, with its place of business in Savannah, Georgia, declined to sell sugar to this defendant and other wholesale grocers in Georgia, or to make allotments of sugar as theretofore, and plaintiff and said refinery and other refineries, in order to make effectual their conspiracy to restrain trade, adopted the plan of writing, telegraphing and orally stating to this defendant and to other wholesale grocers throughout the Southeast that there was a shortage of sugar, and that if defendant and other like wholesale grocers expected to obtain sugars they should immediately make contracts therefor. Further carrying out said conspiracy and combination in restraint of trade, plaintiff and its confederates falsely stated that there was a shortage of sugar, when in truth and in fact there was an ample supply of sugar to meet the demands of all consumers and wholesale grocers, and others using sugar. The plan was [fol. 48] adopted in pursuance of said conspiracy of plaintiff buying or pretending to buy raw sugars in Cuba and elsewhere, which sugars were refined by the refiners confederated with plaintiff, and it was pretended that the sugar belong to plaintiff. Whether plaintiff actually owned the sugar or only pretended to own it, is unknown to this defendant, but on information and belief, defendant says that the purpose of owning or pretending to own the sugars on the part of plaintiff was to enable it and others to increase the prices of sugars beyond their fair value. Further carrying out the conspiracy aforesaid, plaintiff and its confederates withheld sugar from the market, stored it in the refineries and in Cuba and elsewhere, thus falsely convincing defendant and other wholesale grocers that there was a shortage of sugar, when in truth and in fact there was no such shortage. In pursuance of said conspiracy, plaintiff owning or controlling sugar which had cost it, or those for whom it held the sugar, prices at or below fifteen cents per pound, agreed with its confederates to make sales of sugar for July, August and September delivery during

the year 1920, at the price of 25½¢ per lb., or other excessive prices, when a price of 15¢ or 16¢ would have been fully compensatory to the owners of said sugar. By means of said conspiracy, the refiners sought to obtain and did contract to obtain for refining sugar, amounts three or four times as high as had ever been charged theretofore, and likewise higher than was just and reasonable, and plaintiff and others acting as brokers and refiners and confederated with plaintiff, obtained for itself by contract and otherwise, actual or prospective profits greatly in excess of any ever theretofore charged, and greater than were reasonable.

Further to give the appearance of a shortage and to make effective this conspiracy, plaintiff and its confederated conspirators made sales of sugar to speculators and others than those usually engaged in handling and dealing in sugar, thus enabling plaintiff and its confederates to make an unjust and unreasonable charge in handling and dealing in sugar, a necessary of life. By the means aforesaid, [fol. 49] and by other means to defendant unknown, plaintiff succeeded in convincing the public and this defendant that there existed a shortage of sugar, and succeeded in restricting competition and increasing prices and in making contracts for unjust and unreasonable charges for selling and handling sugar, all in violation of the laws of the United States and especially of the anti-trust laws of the United States; and said contracts directly affected interstate commerce and were conspiracies in violation of the laws of the United States, the enforcement of which contracts in this case would be to make effectual such conspiracies.

The purpose, intent and direct effect of the acts of plaintiff aforesaid were to increase the prices of sugar, to restrain and restrict trade in interstate commerce, and falsely and fraudulently to convince defendant and other wholesale grocers and consumers throughout the United States that a shortage existed in the supply of sugar; thus inducing defendant and others to believe that contracts must be entered into at once at prices demanded by plaintiff. Defendant not knowing, nor having opportunity to know, the conditions which plaintiff well knew, and relying on the acts, conduct and representations of plaintiff, signed the writings here sued on, which it would not have done had it known the true facts.

30. That the facts pleaded in paragraphs 28 and 29 hereof show false and fraudulent representations, which made voidable the alleged contracts sued on herein, and because thereof defendant here, as heretofore, disavows said so-called contracts.

Wherefore, defendant says that the alleged contracts sued on in this case are each and all unlawful, in violation of the statute and unenforce-able.

Wherefore, defendant prays that said action may be dismissed, and that it may have judgment for its costs.

Dated, April 30, 1921.

Saussy & Saussy, Savannah, Ga.; Watkins, Russell & Asbill, Atlanta, Ga., Attorneys for Defendant.

[File endorsement omitted.]

[fol. 50] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

DEMURRER TO ANSWER OF DEFENDANT—Filed May 14, 1921

Come now the plaintiffs and demur to the answer filed by the defendant, and for grounds of demurrer say:

First Count

1. Plaintiffs demur to the answer to the First Count as a whole, because the same sets up no matter of defense to the petition.

2. Plaintiffs specially demur to so much of paragraphs 4, 5, 6, 7, 8, and 9 as sets up that the contract upon which suit is entered is unilateral, is not mutually binding and is not an enforceable contract and that there was no sale or purchase made, upon the ground that said several allegations are conclusions of the pleader; that they seek to alter the terms of the written contract sued on; and that they raise questions of law rather than questions of fact, which can only be determined upon demurrer.

3. Plaintiffs specially demur to so much of paragraphs 10 and 11 as seeks to construe the clause of the contract making "terms and withdrawals subject to the approval of the seller's Credit Department," upon the ground that said paragraphs are argumentative, contain conclusions of the pleader only, raise questions of law rather than questions of fact, undertake to construe words and phrases of the contract which are proper matters for consideration by the court upon demurrer, and are not the subject matter of an answer.

[fol. 51] 4. Plaintiffs specially demur to so much of paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24, as allege that the contract upon which suit is entered did not create binding obligations on the plaintiffs or defendant, and that said contracts are not mutually binding contracts, and that there was no agreement on the part of defendant to accept, receive or pay for any sugar, or any duty to give shipping instructions, or any duty to accept the sugar; upon the ground that said allegations are conclusions of the pleader; that they seek to modify, change or alter the plain terms of the written contract; that the questions raised are not matters of fact, but questions of law for the construction and determination of the court, and are not proper subject matter for an answer.

5. Plaintiffs demur to defendant's first special plea, marked paragraph 29, upon the ground that said special plea sets up no matter of defense to plaintiffs' petition; that the same is argumentative and sets up mere conclusions of the pleader; that it contradicts and seeks to alter, change and modify the terms of the written contract upon

which suit is brought; that it raises questions of law and does not raise any issue of fact.

6. Plaintiffs demur to the special plea of defendant, marked paragraph 30, on the ground that the same sets up no defense to plaintiffs' petition; that the same is vague, indefinite and uncertain; that the same is argumentative; that it does not set up sufficient facts to constitute an issue; that it does not set up who participated in the alleged conspiracy, nor any facts done pursuant to said alleged conspiracy, nor when said conspiracy was formed, nor how the same was carried on, nor what acts were done by plaintiffs in furtherance of said alleged conspiracy, nor what law of the United States was violated, nor how interstate commerce was interfered with, nor how interstate trade was restrained or restricted, nor what acts were done calculated [fol. 52] to deceive, or which did deceive or mislead defendant, nor what facts were misrepresented by plaintiffs or any other conspirators, nor what unlawful or improper acts of any character were done by plaintiffs or any other persons alleged to be members of an unlawful conspiracy.

7. Plaintiffs demur to defendant's special plea, marked paragraph 31, upon the ground that said paragraph is vague, indefinite and uncertain; that the same is argumentative; that it sets up no issuable facts; that it is a mere conclusion of the pleader; that no definite, specific facts are alleged which constitute false or fraudulent representations; and because it is not alleged that the defendant relied on any false or fraudulent representations or was deceived thereby, nor can it be told with definiteness what false or fraudulent representations it is contended plaintiffs made, or when they were made, or to whom they were made.

Wherefore, plaintiffs pray that said answer and said special pleas may be stricken.

Second Count

1. Plaintiffs demur to the answer to the Second Count as a whole, because the same sets up no matter of defense to the petition.

2. Plaintiffs specially demur to so much of paragraphs 4, 5, 6, 7, 8, and 9 as sets up that the contract upon which suit is entered is unilateral, is not mutually binding and is not an enforceable contract and that there was no sale or purchase made; upon the ground that said several allegations are conclusions of the pleader; that they seek to alter the terms of the written contract sued on; and that they raise questions of law rather than questions of fact, which can only be determined upon demurrer.

3. Plaintiffs specially demur to so much of paragraphs 10 and 11 as seeks to construe the clause of the contract making "terms and [fol. 53] withdrawals subject to the approval of the seller's Credit Department," upon the ground that said paragraphs are argumentative, contain conclusions of the pleader only, raise questions of law rather than questions of fact, undertake to construe words and

phrases of the contract which are proper matters for consideration by the court upon demurrer, and are not the subject matter of an answer.

4. Plaintiffs specially demur to so much of paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24, as allege that the contract upon which suit is entered did not create binding obligations on the plaintiffs or defendant, and that said contracts are not mutually binding contracts, and that there was no agreement on the part of defendant to accept, receive or pay for any sugar, or any duty to give shipping instructions, or any duty to accept the sugar: upon the ground that said allegations are conclusions of the pleader; that they seek to modify, change or alter the plain terms of the written contract; that the questions raised are not matters of fact, but questions of law for the construction and determination of the court, and are not proper subject matter for an answer.

5. Plaintiffs demur to so much of paragraphs 25, 26 and 27 as allege that there *was* no mutually binding contracts between plaintiffs and defendant, and that defendant was under no legal duty to accept the sugar or to furnish shipping instructions: upon the ground that the same is argumentative and sets up mere conclusions of the pleader; that it seeks to modify, change or alter the plain terms of the written contract; and that the questions raised are not matters of fact, but questions of law for the construction and determination of the court, and are not proper subject matter for an answer.

6. Plaintiffs demur to defendant's first special plea, marked paragraph 28, upon the ground that said special plea sets up no matter of defense to plaintiffs' petition; that the same is argumentative and [fol. 54] sets up mere conclusions of the pleader; that it contradicts and seeks to alter, change and modify the terms of the written contract upon which suit is brought; that it raises questions of law and does not raise any issue of fact.

7. Plaintiffs demur to the special plea of defendant, marked paragraph 29, on the ground that the same sets up no defense to plaintiffs' petition; that the same is vague, indefinite and uncertain; that the same is argumentative; that it does not set up sufficient facts to constitute an issue; that it does not set up who participated in the alleged conspiracy, nor any acts done pursuant to said alleged conspiracy, nor when said conspiracy was formed, nor how the same was carried on, nor what acts were done by plaintiffs in furtherance of said alleged conspiracy, nor what law of the United States was violated, nor how interstate commerce was interfered with, nor how interstate trade was restrained or restricted, nor what acts were done calculated to deceive, or which did deceive or mislead defendant, nor what facts were misrepresented by plaintiffs or any other conspirators, nor what unlawful or improper acts of any character were done by plaintiffs or any other persons alleged to be members of an unlawful conspiracy.

8. Plaintiffs demur to defendant's special plea, marked paragraph 30, upon the ground that said paragraph is vague, indefinite and uncertain: that the same is argumentative; that it sets up no issuable facts; that it is a mere conclusion of the pleader; that no definite, specific facts are alleged which constitute false or fraudulent representations; and because it is not alleged that the defendant relied on any false or fraudulent representations or was deceived thereby, nor can it be told with definiteness what false or fraudulent representations it is contended plaintiffs made, or when they were made, or to whom they were made.

Wherefore, plaintiffs pray that said answer and said special pleas may be stricken.

Jones, Park & Johnston, Attorneys for Plaintiffs.

[File endorsement omitted.]

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[fol. 55] U. S. District Court, Southern District of Georgia, May Term, A. D. 1921

[Title omitted]

Amended Plea and Answer—Filed July 22, 1921

And now comes the defendant, and with the leave of the Court first obtained, amends the answer and plea heretofore filed in this cause, by adding at the end of the original answer and plea the following additional paragraphs numbered as follows:

A. At the time when the said alleged contract sued on was executed there *was* in effect, the certain rules of the United States Food Administration, known as Rules Numbers 6, 7, 8, and 10, which are hereinafter more fully set forth, which rules were binding upon the said plaintiff, and the said plaintiff was a licensee under the said United States Food Administration at the time the said alleged contract was executed. And the said rules were violated by the plaintiff, and the violation of the said rules was the direct and immediate cause of the price provided for in the alleged contract sued on, and the said alleged contract is void and against public policy for the reasons hereinafter more fully shown.

B. Rule 6, provided, "The licensee in selling food commodities shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable justification, especially if tending to result in a higher market price to the retailer or consumer will be dealt with as an unfair practice." The said rules all remained effective until November 15th, 1920.

The Savannah Sugar Refining Corporation for many years prior to the date of the execution of the said alleged contracts, imported

raw sugars, refined the same at its refinery at Port Wentworth, [fol. 56] Georgia, and sold the same to the jobbers and wholesalers in Georgia and other Southern States. The said plaintiff in 1920, and at the time prior to the time of the signing of the said alleged contract sued on, in order to unduly and unreasonably raise the price of sugar, and inflict upon the consuming public a price of sugar that would have been otherwise much lower, combined, conspired and confederated with said Savannah Sugar Refining Corporation, of New York, and with other persons unknown to your defendants so that the said plaintiff would buy and contract to buy a large portion of its refined sugars from the said Refining Corporation, and Lamborn & Company, a firm and a corporation thereupon became sellers at wholesale to the sugar trade, adding to the prices which they had paid or had agreed to pay to the Savannah Refining Corporation an additional margin of profit plus a brokerage, in order to increase the profits not only of the said Lamborn & Company, a firm and a corporation, but likewise in order to increase the profits of the said Sugar Refining Corporation. Under this plan which was thus put into operation by the said plaintiff and said Refining Corporation the said plaintiff disposed of a large part of its supply of refined sugar to former customers of said Refining Corporation, and thereby resales were made within the same trade without any reasonable justification, and the same resulted in a higher market price to the retailer and consumer. And thereby sugar which would otherwise, at the date of the said contract and during the time covered thereby, have sold for fifteen (15¢) cents per pound, was sold and contracted for sale at a price from eight (8) to ten (10) cents per pound higher which was then and there an unreasonable price for refined sugar.

The said acts and conduct of the plaintiff were unknown to this defendant at the time of the signing of the said alleged contract.

C. Rule Seven of the United States Food Administration provided as follows:

"Speculation Prohibited.—No broker or other licensee shall buy [fol. 57] or sell any food commodity for his own account unless he is also engaged in and holds himself out to the trade as conducting the business of distributing such commodity otherwise than on a commission or brokerage basis, or unless he uses such commodities in manufacturing, provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution."

Prior to the time of the signing of the said alleged contract, the said Lamborn & Company both as a firm and a corporation had been engaged in the business of selling sugar as sugar brokers and had held themselves out to the trade as brokers de*la*ing in sugar. The said Lamborn & Company both as a corporation and as a firm, confederated, conspired and agreed together and with the Savannah Sugar Refining Corporation and with other persons unknown to this defendant, to so conduct their business in dealing with sugar, and in order to increase the price of sugar to the consumer unreasonably,

so that the said Savannah Sugar Refining Corporation, would sell a large part of its sugar and contract to sell the same to the said Lamborn & Company a corporation, and Lamborn & Company a partnership, in order to diminish and decrease the supply of refined sugar of the said Refining Corporation, otherwise available for the retail and wholesale trade so that the said Lamborn & Company, both as a corporation and as a firm could go among former customers of the said Savannah Sugar Refining Corporation, and quote higher prices for sugar than would otherwise have been quoted, due to the fact that the Savannah Sugar Refining Corporation had largely contracted to, sell its supply of refined sugar to said Lamborn & Company a firm and a corporation; and the said plaintiff and the said Lamborn & Company a firm and a corporation and said Refining Corporation thereby all violated said Rule Seven (7) aforesaid, as thereby the said Refining Corporation made available to said Lamborn & Company a firm and a corporation, most of its supply of refined sugar, in order that Lamborn & Company could sell and contract to sell the same sugar to the wholesale trade in Georgia and other Southern States, thereby increasing the profits of the said Re-[fol. 58] fining Corporation and of the said Lamborn & Company, a firm and a corporation, and unduly enhancing the price of sugar to the wholesaler and eventually to the consuming public. And the said Lamborn & Company a firm and a corporation at and about the time when said contracts were signed held themselves out to the trade in Georgia and other States, only as brokers dealing in sugar. And the said plaintiff so conducted itself as hereinabove set forth for the purpose of enhancing prices of sugar, and the immediate and direct effect of the same, was to unreasonably advance that price of sugar as set forth in the alleged contract.

D. This defendant further shows that Rule Eight (8) of the United States Food Administration provides as follows:

"Sales to Speculators Forbidden.—No licensee shall knowingly sell any food commodity to a broker or other licensee who is not buying for personal consumption or engaged in using such commodity in manufacturing, or who is not regularly engaged in and holding himself out to the trade as conducting the business of distributing such commodity otherwise than on a commission or brokerage basis, provided that this rule shall not apply to sales on an exchange, board of trade or similar institution."

The said plaintiff at the time of the execution of the alleged contract sued on and prior thereto knowingly violated the last named rule, for the said plaintiff knowingly bought and contracted to buy refined sugar from the Savannah Sugar Refining Corporation, which was then and there a licensee of the United States Food Administration, and said Lamborn & Company was then and there a broker and a licensee who was not then and there buying sugar for personal consumption and was not engaged in using said commodity in manufacturing and was not then and there regularly engaged in and holding itself and themselves out to the trade as conducting the busi-

ness of distributing such commodities otherwise than on a commission basis, and the sales and contracts for sales were not made on an exchange or board of trade or other similar institution. And the [fol. 59] plaintiff violated the said rule in the above respects, for the purpose of unduly enhancing the price of refined sugars, in order that not only could the Savannah Sugar Refining Corporation arrange for a large profit, the exact amount of which is unknown to this defendant, but that also the said Lamborn & Company, a firm and a corporation could speculate in sugar, and thereby increase unduly and unreasonably the market price of sugar to the wholesaler and ultimately to the consumer, and by such violation the said price of sugar was unduly and unreasonably increased, and at the time of the execution of the contract sued on in this case, the said price of sugar was fixed at the price set forth in the said alleged contract, by the plaintiff, which was from eight (8) to ten (10) cents per pound beyond a reasonable price for sugar at the time the said alleged contract was signed.

E. And the defendants for further answer show, that Rule Ten (10) of the United States Food Administration provides:

"Unfair Practices Forbidden.—The licensee shall not buy, contract for, sell, store, or otherwise handle or deal in any food commodities for the purpose of unreasonably increasing the price or restricting the supply of such commodities, or of monopolizing or attempting to monopolize either locally or generally, any of such commodities."

The said plaintiff as licensee of the United States Food Administration at and prior to the time of the signing of the alleged contract sued on, violated the said rule, for the said plaintiff contracted for, sold, stored, handled and dealt in sugar for the purpose of unreasonably increasing the price thereof and restricting the supply of said commodity, and monopolized and attempted to monopolize locally, in the State of Georgia, refined sugar for that said plaintiff at and prior to the time of the signing of said alleged contract sued on, combined, confederated and conspired and agreed with Savannah Sugar Refining Corporation, then and there a corporation, and with other persons unknown to this defendant, for the said Refining Corporation to withdraw to a large extent from selling its refined [fol. 60] sugar at wholesale to the wholesaler jobbers, its former customers and to sell practically all of its refined sugars to Lamborn & Company a firm, and a corporation, in order that it might appear to the trade that the said Refining Corporation did not have sufficient supply of refined sugar to supply the usual and ordinary demand of its former customers, and in order that the said Lamborn & Company, a firm, and a corporation, which had theretofore held itself out to the trade as a broker in sugar, could offer to the said sugar trade the said refined sugar, and could in addition to the price Lamborn & Company, a firm and a corporation agreed to pay to said plaintiff, charge an additional price including brokerage in offering such sugars to the wholesale jobbers in Georgia, and in other Southern States. In this manner, and to the end that the Whole-

sale jobbers would be lead into believing that there was a world shortage in sugar, and that it would be practically impossible to buy sugar in the fall of 1920, except at almost *p*hohibitive prices, the said plaintiff and Lamborn & Company a firm and a corporation, and the Savannah Sugar Refining Company organized a systematic campaign for the purpose of distributing propaganda among the wholesale jobbers, and did distribute propaganda in the form of letters and telegrams to the sugar trade, for the purpose of inducing them to contract to buy sugar at unreasonably high prices, to-wit: $0.22½ cents per pound to $0.25 cents per pound. That the said plaintiff thereby succeeded in inducing the defendant to sign the said alleged contract sued on, believing that the said plaintiff could not contract to sell the said sugar to defendant at a less price with a reasonable margin of profit to plaintiff, whereas if the plaintiff had not violated the said Rule Ten (10) there would not have been a sufficient supply of sugar to supply the said Refining Corporation's customers, including the defendant at prices from eight (8) to ten (10) per cent per pound cheaper than the price stated in the said alleged contract. And the said plaintiff monopolized and attempted to monopolize sugar, in Georgia and in other Southern States, by combining with the said Sugar Refining Corporation so that the said Refining Corporation, would pool the refined sugars available to them, withheld the same from the market at and prior to the time of the signing of the said contract sued on, and thereby created the [fol. 61] impression that there was not sufficient sugar on hand to fill the demands, thereby creating a fear in the minds of the customers of both of them, that sugar was very scarce, and after so withholding such sugars from the market, and increasing the price of the same, made contracts for future delivery of the same based on inordinately high and excessive prices, to the great injury of the sugar consuming public. And the direct result of all of the aforesaid, was that the said price for sugar set forth in the alleged contract sued on, was excessive and unreasonably high, and at least eight (8) to ten (10) cents per pound above a reasonable price for refined sugar.

F. And this defendant further shows that the said plaintiff combined conspired and confederated with the Savannah Sugar Refining Corporation, and with other persons unknown to defendant at and prior to the time of the signing of the alleged contract sued on, to withhold by possession and under a contract or arrangement made between them and with other persons unknown to defendant, from the market, refined sugars for the purpose of unreasonably increasing the price of refined sugar, in violation of Section Six (6) of the Act of Congress aggroved August 10th, 1917. That the same was effected in this manner, the Savannah Sugar Refining Corporation, withheld a large part of its refined sugar from the market, and contracted and arranged with Lamborn & Company, a firm and a corporation to supply the said Lamborn & Company a firm and a corporation with a large part of its refined sugar, so that both of them withholding sugar from the trade, they could produce the im-

pression of scarcity of said commodity, all of which they did and their purpose for so doing was for the purpose of unduly increasing the price of sugar, and the plaintiff thereby induced the defendant into signing the said alleged contract, to believe that there was a great scarcity of sugar and as a result thereof the price as mentioned and fixed upon by the said plaintiff, was arrived at.

And for all of the above reasons the said alleged contract is null and void and is against the policy of the law and against public [fol. 62] policy, and the defendant urges all of these amended defenses in addition to those heret-fore interposed in the case.

G. And the defendant further with leave of the Court amends its fourth, fifth and seventh paragraphs of the first and second answers filed in this cause by adding at the end thereof the following:

"And this defendant pleads that there never was a contract entered in between the plaintiffs and this defendant. That Lamborn & Company prior to the date of the said alleged contract did business as a corporation, with offices at #98 Wall Street, New York. That at the time the said alleged contract was signed, defendant did not know that there was a Lamborn & Company, a firm of the same address engaged in the same business, and believed at the time of signing said writing that it was dealing with Lamborn & Company, a corporation. That the said alleged contract does not state whether it was made by a firm or by a corporation. That defendant did not know until the filing of the suit in this case that Lamborn & Company, a firm, claimed to have been the person with whom the said alleged contracts were made. That defendant never knew that the said co-partnership was the other party to said alleged contracts, on the contrary had always believed that Lamborn & Company named in said contracts was a corporation, and since the signing of the same the defendant has never ratified nor confirmed the said alleged contracts; And for that reason no valid contracts were ever executed, and the said alleged contracts are entirely indefinite and uncertain and as now claimed by plaintiffs named a party entirely, unknown to the defendant and for these and other reasons herein set out and hereinafter set out there was no binding contract."

H. The defendant amended the eight- paragraph of said answer to the first and second counts of said petition, by striking the said answers to said paragraphs contained in the original answer, and inserting in lieu thereof the following:

The defendant denies the allegations contained in the eighth paragraph of said petition.

I. The fifteenth paragraph of the answer in each count is amended by changing the number "six" to the number, "fifteenth," in the second line of each of said paragraphs.

J. The eleventh line of the thirtieth paragraph of the answer to each of the counts of said petition, is amended by inserting after the word "interstate" the words "and intrastate," and in the eight- line from the end of each of the said paragraphs thirty, by inserting after

the word "laws" the following: "and the public policy of Georgia and."

[fol. 63] K. And defendant further pleads that under Section 5 of the Act of Congress approved August 10th, 1917, the plaintiff became a licensee as therein provided for and accepted said license under an obligation to abide by and perform the requirements of the said Section and the rules and regulations promulgated thereunder by the President of the United States. Under said Section the President of the United States found that any profit in the handling, selling and distribution of sugar by wholesale in excess of one (1¢) cent per pound was unjust and unreasonable. And the plaintiffs as licensee, was required to so conduct their sale of sugar at wholesale, whereby they should not realize a profit of more than One (1¢) cent per pound. Which profit the President of the United States found was just, reasonable and fair,—and which this defendants shows was irrespective of the order of the President aforesaid, a reasonable profit to be made by such a licensee on future sales of sugar at wholesale. Notwithstanding its premises, the plaintiff unknown to the defendant at the time of signing said alleged contract, *knowling* charged and contracted to receive a profit in excess of one (1¢) cent per pound, to-wit: a profit of from eight (8) to ten (10¢) cents per pound on the sale of said sugar, described in said alleged contract. And by reason which the said alleged contract became and is illegal and un-forceable, and the plaintiffs should not be entitled to recover thereon.

L. And this defendant further shows that the plaintiff in making the said alleged contract with defendant, further violated Section 6 of the Act of Congress of August 10th, 1917, as follows: For that said plaintiff by its conduct and the facts above set forth in this amendment hoarded necessaries, to-wit: refined sugar,—and contracted for and arranged to contract for a quantity of refined sugar, in excess of its reasonable requirements, for its business, and for sa-e by it in a reasonable time. And withheld under the alleged contract and by arrangement with the Savannah Sugar Refining Corporation and other refiners unknown to defendant, refined sugar from the market for the purpose of unreasonably increasing the price thereof.

M. That all of the said acts and transactions of the plaintiff directly affected and was the cause of the price named in the contracts sued on. That the direct effect of the conduct of the plaintiffs was to make the contract price of the sugar excessive and illegal and should this court lend its aid to the enforcement of the said contracts sued on, it would enable the plaintiff to realize the fruits of its unlawful agreement and acts.

Respectfully submitted, Saussy & Saussy, Watkins, Russell & Asbill, Counsel for Defendant.

[fol. 64] Amendment allowed, subject to objections. In open Court, Feby. 20th, 1922.

Beverly D. Evans, U. S. Judge.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO ANSWER—Filed Mar. 5, 1923

Defendants petition court for permission to amend their answer previously filed by adding thereto the following paragraphs:

50. At the time of the execution of the alleged contract here sued upon there was in force and effect section five of the National Defense Act, as contained in United States Compiled Statutes 1916, supplement of 1919, section 3115-⅛ g, page 660, together with proclamations issued by the President of the United States on September 7th and October 8th, 1917, in administering said section.

51. Said section 3115 ⅛ g above cited, provided that, "from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining, or distribution of any necessaries in order to carry into effect any purposes of this act, and shall publicly so announce, no person shall * * * engage in or carry on any such business specified in the announcement of importation, manufacturing, storage, mining, or distribution of any necessaries * * * unless he shall secure and hold a license issued pursuant to this section * * *"

52. Exercising the authority vested in him by section quoted [fol. 66] above, the President, on September 7th, 1917, issued his public proclamation providing:

"All persons, firms, corporations and associations engaged in the business either of importing sugar, of manufacturing sugar syrups or molasses, (except those specifically exempted by said Act of Congress), are hereby required to secure on or before October 1, 1917, a license, which license will be issued under such rules and regulations governing the conduct of such business as may be prescribed. Applications for licenses must be made to the United States Food Administrator, Washington, D. C., upon forms prepared by him for that purpose."

and on October 8, 1917, issued another public proclamation providing:

"All persons, firms, corporations and associations engaged in the business of either (1) operating cold storage warehouses (a cold storage warehouse for the purpose of this proclamation being defined as any place artificially or mechanically cooled to or below a temperature of 45 degrees above zero Fahrenheit, in which food products are placed and held for thirty days or more), (2) operating elevators, warehouses or other places for the storage of corn, oats, barely, beans, rice, cotton seed, cottonseed cake, cottonseed meal or peanut meal, or (3) importing, manufacturing (including milling, mixing or pack-

ing), or distributing (including buying and selling) any of the following commodities:

"Sugar, syrups or molasses, are hereby required to secure on or before November 1, 1917, a license, which license will be issued under such rules and regulations governing the conduct of the business as may be prescribed.

"Application for license must be made to the United States Food Administration, Washington, D. C., Law Department—License Division, on forms prepared by it for that purpose, which may be secured on request."

53. The effect of said section above quoted and the proclamations of the President based thereon was to require plaintiff to have a separate and distinct license to import, manufacture, or distribute sugar involved in this suit, and plaintiff, having a license neither to import, manufacture, or distribute, could and did not legally contract with defendants for the sale to them of any such sugar, and the alleged contract is void for non-compliance by plaintiff with the statute of Congress and the proclamations and regulations of the President made thereunder, and especially is this true since Plaintiff held no license to distribute sugar.

Watkins, Russell & Asbill, Attorneys for Defendants.

[fol. 67] ORDER

The foregoing amendment read and considered, the same is herewith allowed and ordered filed as a part of the record, this 2nd day of February, 1923.

Wm. H. Barrett, Judge Superior Court.

[File endorsement omitted.]

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[fol. 68] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

DEMURRER TO AMENDMENT TO ANSWER—Filed Feb. 25, 1922

Come now the plaintiffs and demur to the answer filed by the defendant and move to strike the same upon the following grounds, to-wit:

1. Because the amendment as a whole sets up no matter of defense to the petition.

2. Plaintiffs demur to paragraphs numbered A, B, C, D, E, and F, as a whole, because said paragraphs set up no matter of defense to the petition, and because the Act of Congress approved August 10, 1917, is unconstitutional, null and void and of no effect, because

in violation of and repugnant to the fifth and sixth amendments of the Constitution of the United States, in that said Act of Congress fixes no ascertainable standard of guilt, is not adequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them, is an attempt to delegate legislative power to courts and juries, and is too vague, general and indefinite in its terms to be capable of enforcement either civilly or criminally, and attempts to penalize indefinite acts, and the rules and regulations adopted by the United States Food Administration pursuant to the said Act are without authority of law, because based upon an unconsitutional Act, and said rules and regulations are themselves indefinite and incapable of enforcement either civilly or criminally, and because the violation of the said several rules, even if the same were valid, does not affect the validity of the contracts upon which the suit is based.

[fol. 69] 3. Plaintiffs specially demur to paragraph A, because said paragraph whether taken alone or in connection with other paragraphs of said answer sets up no matter of defense to plaintiff's petition, and because the several rules of the United States Food Administration referred to therein were passed pursuant to the authority of an unconstitutional statute, and are, therefore invalid and unenforceable, and because said rules are too vague, general and indefinite to be capable of enforcement and because a violation of the rules therein pleaded does not affect the validity of the contracts upon which suit is brought.

4. Plaintiffs specially demur to paragraph B, of said amendment upon the ground that said paragraph whether taken by itself or in connection with the other paragraphs of said amendment sets up no matter of defense to plaintiffs' petition, and because a violation of the rule therein referred to could not affect the validity of the contracts upon which suit was entered, and because the facts pleaded affirmatively show that said rule was not violated by plaintiffs, and because said rule is unenforceable because not authorized by any valid act of Congress. Plaintiffs demur to so much of said paragraph as undertakes to allege a conspiracy, because the same is vague, indefinite and uncertain, and does not set up facts sufficient to constitute an issue; that it does not set up who participated in the alleged conspiracy, nor aver facts sufficient to excuse the want of such allegation; that it does not set up what acts, if any, were done, pursuant to said alleged conspiracy, nor when the same was formed, nor how it was formed, nor what acts were done by plaintiffs in furtherance of said alleged conspiracy, nor how the facts in any manner affect the validity of the contracts upon which suit is brought.

[fol. 70] 5. Plaintiffs specially demur to paragraph C of said amendment upon the ground that said paragraph whether taken by itself or in connection with the other allegations of the answer sets up no matter of defense to plaintiffs' petition, and because a violation of the rule therein referred to did not affect the validity of the contracts sued upon, and because the facts pleaded affirmatively show

that said rule was not violated by the plaintiffs, and because said rule is unenforceable because not authorized by any valid Act of Congress, and because the allegation- therein with reference to the alleged conspiracy are too vague, indefinite and uncertain to form an issue.

6. Plaintiffs specially demur to paragraph D of said amendment, because said paragraph whether taken by itself or in connection with the other paragraphs of the answer sets up no matter of defense to plaintiffs' petition, and because a violation of the rule therein pleaded does not affect the validity of the contracts sued upon, and because the facts pleaded affirmatively show that said rule was not violated by the plaintiffs, but that plaintiffs were necessarily engaged in holding themselves out to the trade and conducting the business of distributing sugar when said sales were made, and because said rule *in* unenforceable, because not authorized by any valid act of Congress.

7. Plaintiffs specially demur to paragraph E of said amendment because the facts stated in said paragraph whether taken by themselves or in connection with the other paragraphs of said amendment set up no matter of defense to plaintiffs' petition, and because a violation of the rule therein pleaded does not affect the validity of the contracts upon which suit is brought, and because the facts pleaded affirmatively show that said rule was not violated by plaintiffs, and because said rule is too vague, indefinite and uncertain in its terms to be capable of enforcement, and because said rule is unenforceable because not authorized by any valid Act of Congress, and because said facts alleged constituting a violation of said rule are affirmatively shown not to be illegal, and because the alleged representations as to shortage of sugar were not representations of fact, but of matter of opinion for speculation, and such representations could not invalidate contracts upon which suit is brought, [fol. 71] and because the allegations of said paragraph are irrelevant and immaterial. Plaintiffs specially demur to so much of paragraph E as alleges that the price for sugar set forth in the contracts upon which suit is brought was excessive and unreasonably high and at least eight to ten cents above a reasonable price for refined sugar, upon the ground that said allegations set up no matter of defense to plaintiffs' petition, and are altogether irrelevant and immaterial.

8. Plaintiffs specially demur to paragraph F of said amendment upon the ground that the facts therein stated whether taken alone or in connection with the other paragraphs of the amendment set up no matter of defense to plaintiff's petition, and because the withholding of sugar from the market, even if it were done, can not affect the validity of the contracts upon which suit is brought, and because to produce the impression that sugar was scarce could not affect the validity of the contracts upon which suit is entered, the scarcity of sugar being matter of opinion and speculation, and not a substantive fact capable of ascertaining, and because the sale of

sugar could not constitute a holding thereof in violation of the Act of Congress referred to, and because the allegations of said special plea are irrelevant and immaterial.

9. Plaintiffs specially demur to Paragraph G of said amendment, because the facts therein alleged constitute no matter of defense to plaintiff's petition, and because no injury is alleged to have been sustained by defendant on account of the fact that defendant supposed its contract was with one party, when it developed that the contract was with another party of the same name, and because it is not alleged that plaintiffs deceived defendant or mislead defendant in any way, or contributed in any degree to the misunderstanding of the defendant, if any such misunderstanding existed.

[fol. 72] 10. Plaintiffs specially demur to paragraph K of said amendment upon the ground that said paragraph sets up no matter of defense to plaintiffs' petition, and because no authority was sufficiently vested in any Department or Officer of the United States to fix a reasonable profit on sugar, because the Act of Congress approved August 10, 1917, and referred to in the amendment, is too vague, indefinite and uncertain to be capable of enforcement, and because said Act is unconstitutional, null and void, because in violation of the fifth and sixth amendment of the Constitution of the United States, and because the allegations are irrelevant and immaterial, and set up conclusions of the pleader which are not authorized by law.

11. Plaintiffs specially demur to paragraph L of said amendment, because said paragraph sets up no matter of defense to plaintiffs' petition, and because the Act of Congress therein relied on is unconstitutional, null and void because in violation of the fifth and sixth amendments of the Constitution of the United States, in that said Act is too vague, indefinite and uncertain to be enforceable, and because the sale of sugar does not constitute a hording thereof within the meaning of said Act, and because said allegations are vague, indefinite and uncertain, no issuable facts are set up; said allegations are mere conclusions of the pleader.

12. Plaintiffs specially demur to paragraph M of said amendment because said paragraph sets up no matter of defense to plaintiffs' petition, and because said paragraph sets forth no issuable facts, but is simply a conclusion of the pleader, and which said conclusion is not warranted by the facts attempted to be set up either in this paragraph or in the other paragraphs of said amendment.

Wherefore, plaintiffs pray that said amendment may be stricken.
Jones, Park & Johnston, Plaintiffs' Attorneys.

[File endorsement omitted.]

[fol. 73] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

ORDER SUSTAINING DEMURRER TO DEFENDANT'S ANSWER—Filed Feb. 25, 1922

The plaintiffs' demurrer to the defendant's answer, and the plaintiffs' objections to the proposed amendment to the defendant's answer, in the above case, having come on regularly for hearing, after argument of counsel and consideration thereof by the Court, It is ordered as follows:

1. Grounds 2, 3, 4, 5, 6 and 7 of the demurrer to the first count of said answer are hereby sustained, and the allegations to which said grounds of demurrer are directed are hereby stricken from said answer.

2. Grounds 2, 3, 4, 5, 6, 7 and 8 of the demurrer to the second count of said answer are hereby sustained and the allegations in said answer to which said grounds of demurrer are directed are hereby stricken from said answer.

3. The first ground of the demurrer to the first and second count of said answer as a whole is hereby over-ruled.

4. The objections to the amendment to the answer are hereby sustained, and said amendment stricken.

This February 20th, 1922.

Beverly D. Evans, United States Judge.

[File endorsement omitted.]

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[fol. 74] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

AMENDED JUDGMENT ON DEMURRERS TO ANSWER—Filed Feb. 22, 1922

In the above cause, the defendant filed answer, and later filed an amendment thereto which was allowed by the Court, subject to demurrer.

Demurrers to the original and amended answer were made by the plaintiff, and the court after argument sustained the demurrers, and ordered portions of the original answer and all of the amended answer stricken.

The demurrers to the amended answer were made orally, and later by permission were allowed to be filed in written form.

The judgment of the court sustaining the demurrers to and answer and amendment, is hereby amended by this order, to show that the ruling of the Court striking the amended answer, was on the demurrer thereto relating to the merits of the defenses therein set forth.

Done the 21st day of February, A. D., 1922.

Beverly D. Evans, United States Judge.

[File endorsement omitted.]

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[fol. 75] IN UNITED STATES DISTRICT COURT

EXCEPTIONS — ORDER OVERRULING DEMURRER TO AMENDED PETITION, ETC.—Filed May 21, 1921

The Court having overruled the demurrers of the defendant to the petition of the plaintiff as amended in the above entitled cause, the defendant now at the term at which said judgment was rendered, excepts to the ruling and judgment of the court, and prays that these exceptions may be noted, and preserved in this bill of exceptions pendente lite.

Watkins, Russell & Asbill, Saussy & Saussy, Counsel for Defendant.

The above and foregoing bill of exceptions pendente lite are ordered filed and made part of the record of said cause.

In open Court the 21st day of May, A. D. 1921.

Beverly D. Evans, United States Judge.

[File endorsement omitted.]

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EXCEPTIONS OF DEFENDANT TO STRIKING OF DEFENSES

And now comes the defendant, and files these exceptions to the ruling and judgment of the court in which the court sustained the demurrers of the plaintiff, to the pleas and answers as amended, of the defendant, and prays that these exceptions be noted and ordered filed. The said defendants assign- as error the said ruling and judgment of the Court, on each of the grounds of demurrer thus sustained, and excepts to the judgment overruling defendant's demurrer to petition.

Watkins, Russell & Asbill, Saussy & Saussy, Counsel for Defendant.

Exceptions noted and ordered filed.

In open Court, February 21st, 1922.

Beverly D. Evans, United States Judge.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES DISTRICT COURT

VERDICT—Filed Mar. 6, 1923.

We the jury find for the plaintiff against the defendant, the sum Fifteen Thousand, two hundred and eighteen and 14/100 Dollars, principal, with interest thereon at the rate of 7% per annum from the 1st day of October, 1920.

This 6th day of March, 1923.

W. A. Lane, Foreman.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed Mar. 7, 1923

The jury having rendered a verdict in favor of the plaintiff against the defendant for the sum of $15,218.14 principal, together with interest thereon from the 1st day of October, 1920, at the rate of 7% per annum.

It is thereupon considered, ordered and adjudged by the Court that the plaintiff, Lamborn & Company, do have and recover of the defendant, The A. B. Small Company, the said sum of $15,218.14 principal, together with the sum of $2,592.13 interest to this date, and future interest at the rate of 7% per annum, and costs of suit to be taxed by the Clerk.

This March 7th, 1923.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

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[fol. 77] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed May 5, 1923

And now comes The A. B. Small Company, defendant herein, and says:

That on or about the 7th day of March, 1923, the District Court entered a judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed in this petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Fred T. Saussy, Max Asbill, Horace Russell, Edgar Watkins,
Attorneys for Defendant.

[File endorsement omitted.]

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[fol. 78] In the District Court of the United States for the Western Division of the Southern District of Georgia

[Title omitted]

Assignment of Errors—Filed May 5, 1923

Comes now The A. B. Small Company, a corporation, defendant herein, and in connection with its petition for Writ of Error in this cause assigns the following errors which it avers occurred on the trial of the above stated cause and in the verdict of the jury and the entry of the judgment in favor of the plaintiff and against the defendant, and upon which errors it relies to reverse the judgment entered herein as appears of record:

1. Because the court erred in its ruling on the demurrer of the plaintiff to the answer of this defendant in sustaining the said demurrer and in holding that the Act of Congress approved August 10, 1917, known as the Lever Act, is unconstitutional, null, and void, because in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.

2. Because the court erred in striking those parts of this defendant's answer wherein defendant pleaded and relied upon the Act of Congress of August 10, 1917, chapter 53, page 276, which Act de-
[fol. 79] fendant pleaded as a valid, constitutional statute of the United States, and which Act was contended by plaintiff in the demurrer to defendant's answer to be unconstitutional, null and void, in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.

3. Because the Court erred in sustaining plaintiff's demurrer to defendant's plea setting up the Anti-Trust laws of the United States as a defense and in striking such defense.

4. Because the Court erred in striking the pleas of defendant and in sustaining plaintiff's demurrers thereto, such pleas being based on the Anti-Trust laws and the pleas in detail showing that the plaintiff in this case in conspiracy with others combined to raise the prices of sugar sold in interstate commerce, that such prices were increased to an exorbitant sum, future contracts exacted, and that to enforce

the contract sued on would be to make effective an essential part of such illegal scheme.

5. Because the Court erred in not sustaining the demurrer of defendant to the second count of the declaration of plaintiff, the said court with the alleged contracts attached thereto failing to state a cause of action against the defendant.

6. Because the Court erred in not sustaining the demurrer to all the counts of the declaration of the plaintiff, said counts and the contracts attached thereto and made part thereof showing that the alleged contracts were void because not constituting any such mutual obligations as would make them valid.

[fol. 80] 7. Because the Court erred in not sustaining the demurrer to all the counts of plaintiff's declaration and in not dismissing the cause, for the reason that the declaration sued on, with the exhibits thereto attached, showed that the plaintiff was not bound to deliver, in that each of the alleged contracts contained a provision that "terms and withdrawals subject to the approval of seller's credit department"; such provisions giving the seller the right at its option to approve or disapprove any and all withdrawals and such provisions depriving the alleged contracts of mutuality and consideration and making the alleged contracts null and void.

8. Because the Court erred in not sustaining the demurrer of defendant to all the counts of the declaration sued on herein and erred in not dismissing this cause, it appearing from said declaration and the exhibits thereto attached that no obligation to deliver existed under either of said alleged contracts if the "refiner manufacturing sugar should be interrupted because of any of the conditions" named in said alleged contracts, such provisions depriving the alleged contracts, of mutuality and making them uncertain and indefinite and not binding on the defendant.

9. Because the court erred in not permitting the witness J. E. Yates, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to one thousand pounds at prices September 1st, 1920, of nineteen cents per pound gradually decreasing from that [fol. 81] date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

10. Because the Court erred in not permitting the witness R. B. Small, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to two thousand and thirty pounds, at prices September 1st, 1920, of nineteen cents per pound, gradually de-

creasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

11. Because the Court erred in not permitting the witness W. E. Small to testify as indicating market value and as affecting the question of the legality of the resales pleaded to, sales of sugars and quotations equal to and greater and at prices higher than was obtained about the same time by plaintiff in making its resales.

12. Because the court erred in not permitting the witnesses R. B. Small and J. E. Yates, wholesale grocers in Macon, Georgia, to testify as to prices obtained by them from sales of sugar to retail merchants and chain stores for the months of September, October, and November, 1920.

13. Because the Court erred in directing a verdict for the plaintiff [fol. 82] on the resale count of its petition, there being evidence sufficient to demand a submission of the question of the validity of such resale to the Jury and to support a finding of the jury that such resale was not fairly made in a reasonable time.

14. Because the Court erred in striking defendant's plea alleging that plaintiff had no license as a distributor of sugar.

By reason whereof, plaintiff in error prays that the judgment aforesaid may be reversed, etc.

Fred T. Saussy, Mac Asbill, Horace Russell, Edgar Watkins,
Attorneys for Plaintiff in Error, The A. B. Small Company.

[File endorsement omitted.]

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[fols. 83 & 84] SUPERSEDEAS BOND FOR $20,000.00—Approved and filed May 5, 1923; omitted in printing.

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[fol. 85] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

**Bill of Exceptions**—Filed May 5, 1923

Be it remembered, that on the trial of this case wherein Lamborn & Company, a partnership composed of A. H. Lamborn, G. P. Tameling, H. B. Hutchins, N. N. Keen, George H. Logan, Karl P. Lindgren, C. C. Riggs, C. G. Troup, W. V. Wood, B. W. Dyer, and Victor R. Hess, was plaintiff, and The A. B. Small Company, a corporation, was defendant in this court. A petition was filed by the plaintiff on the 12th day of April, 1921. Thereafter on the 30th day of April, 1921, the defendant interposed its demurrer to said petition, and on said date filed its answer thereto.

Thereupon the plaintiff on May 14th, 1921, amended their petition, and on May 19th, 1921, filed an additional amendment to the petition. On the 19th day of May, 1921, there came on to be heard the demurrer of the defendant to the petition of the plaintiff and to the petition as amended, and after argument the Court entered its findings and order overruling the defendant's demurrer and amended demurrer.

To the rulings of the Court overruling the demurrer of the defendant to the plaintiff's petition and the amended demurrer to the petition as amended, defendant then and there excepted, which exceptions were then allowed and are here and now sealed.

Thereafter, on the 20th day of February, 1922, the defendant amended its answer by adding paragraphs (a) to (f) inclusive, and specifically plead as a defense to the Act of Congress approved August [fol. 86] 10th, 1917, known as the Lever Food Control Act, and also plead as a defense the rules and regulations of the United States Food Administration.

To this amendment plaintiff demurred upon the ground that the said Act of Congress was unconstitutional, null and void, and of no effect because in violation of and repugnant to the Fifth and Sixth Amendments to the Constitution of the United States.

The demurrer of the plaintiff to the original answer of the defendant and to the amendment filed on February 20th, 1922, came on to be heard on the said 20th day of February, 1922, and after argument the Court sustained the plaintiff's demurrer to the original answer, and struck therefrom the special defenses set out therein and also sustained the demurrer of the plaintiff to the amendment and to paragraphs (a) to (f) inclusive thereof, and an order sustaining said demurrer was entered on the said 20th day of February, 1922, and on February 21st, 1922, said order was amended by an explanatory order entered on said date.

To which said orders sustaining said demurrers and striking the special defenses of defendant, the defendant, The A. B. Small Company, then and there excepted, which exceptions were then allowed and are here and now sealed.

Thereafter, on the 2nd day of February, 1923, the defendant further amended its answer by adding thereto paragraphs 50 to 53, inclusive, specifically pleading the rules and regulations of the United States Food Administration made under the said Act of August 10th, 1917, requiring the licensing of persons dealing in food products. Said amendment was allowed by the Court on said date.

[fol. 87] Thereafter at the October term 1922 of said Court, to wit on the 5th and 6th days of March, A. D., 1923, Honorable William H. Barrett, Judge presiding, the following proceedings were had:

A jury having been duly and legally impaneled and sworn according to law, thereupon plaintiff, to sustain the issue on its part, introduced certain testimony. After the plaintiff had introduced its testimony defendant, to sustain the issue upon its part, introduced certain testimony. The evidence and all the evidence affecting the matters to which this bill of exceptions relates was as follows, to wit:

Plaintiff then offered in evidence the written contracts marked "Exhibit A" and "Exhibit B," attached to plaintiff's petition, the first being No. 672 and dated April 30, 1920, the second being No. 1080 and dated May 7, 1920. As these contracts are already in the record as part of the pleadings they are not again copies.

CORRESPONDENCE

Letter is from A. B. Small Company, addressed to Lamborn & Company, Savannah, dated Macon, Ga., August 7, 1920.

"If you have on file any order for us for sugar, we would be glad that you withhold shipment until we advise you further. You no doubt appreciate the fact that this market is very much overstocked on sugar just at present."

Lamborn & Company replied on August 9th:

"Your letter of August 7th received. We are indeed anxious to accom-odate you in the handling of your sugar purchase, but the fact of the matter is that the sellers are required to move the sugar as the storage place at the refinery will not permit of their holding the sugars indefinitely. We can do doubt arrange to delay shipment of your sugars until August 15th, but by that time the August portion of your contract must go forward. According to our records you have not as yet furnished us with specifications covering the August portion of your contract, and we will appreciate your doing [fol. 88] so, that we can make shipment by the 15th. While this is not as long a delay as you desire, we believe you will appreciate even a delay of this much."

An August 13th, Mr. Small wrote to Lamborn & Company, at Savannah:

"We acknowledge yours of the 9th relative to sugar and note that you state you can probably arrange to hold shipment until August 15th but that is the last date that you can hold same. In this connection will state that we now have plenty of sugar on the floor, really have no storage space, and will have to insist on your holding up shipment of this sugar a while longer. It appears that the sugar market is now getting very weak and as you represent the refiners and as the jobbers throughout the country have depended on your advice relative to future purchases of sugar, we would like to have an expression from you as to whether or not you are going to give the jobber any protection in case of decline."

Lamborn & Company replied to that on August 19th as follows:

"Your letter of August 13th has been received. Sellers appreciate the difficulties under which you are laboring and regret very much that you are having trouble. As you know, guaranteed prices in the sugar business are a thing of the past. It is true that a year ago this

practice was followed, but is not at the present time. We do not believe that you will find that any refiners in this country are guaranteeing prices against decline. Needless to say we wish conditions were such that we could relieve you of any loss that you may have to sustain in your purchases, but this would, as you can readily appreciate, be impossible. We think that upon further reflection you will realize that the demoralized market is not due so much to lower quotations in the price of refiners as it is due to the excess amount of second hand sugars offered by wholesale grocers and manufacturers; in fact, with the exception of Arbuckle and McCahan, there have been no changes in refiners' prices. * * * We believe you will agree with us that sellers have been as lenient as possible in delaying shipment of the August portions of your contracts. They have gotten to a point where they cannot hold these sugars any longer and we trust therefore that you will let us have shipping instructions without any further delay."

Lamborn & Company, on August 25, wired A. B. Small Company:

"Lamborn & Company New York with whom you have sugar contract insist that you wire shipping instructions immediately covering August portion of the contract aggregating one hundred fifty barrels stop Have been as lenient as possible extending you liberal delay stop Your sugar is ready to move and sellers are merely awaiting your shipping instructions stop You are legally and morally [fol. 89] bound to furnish these shipping instructions when requested by sellers stop No further delay can be extended and you will avoid considerable loss by wiring instructions immediately."

To that telegram the A. B. Small Company replied August 27th:

"Your night letter of the 26th received and if you hold our contract to be legal and insist on shipment we will accept same under protest stop If you ship be sure to ship only standard fine granulated sugar, half amount in barrels and balance in hundred pound sacks stop Our contention is that this contract might not be in accord with actual facts and you perhaps more than anyone in the United States should have been posted on actual sugar market conditions stop These representations made by you induced us to sign this sugar contract."

On August 28th, Lamborn & Company wrote Small:

"Your telegram of August 27th has been received. We are ordering out the August portions of your contracts Nos. 672 and 1080. We take it that this action on our part is sufficient answer to your telegram of August 27th."

Letter from The A. B. Small Company to Lamborn & Company on September 7, 1920:

"We wired you yesterday as follows: Car sugar Southern 308982 shipped by you over our protest is here subject to your disposition.

We made error in car number and same should have read Southern 335982. When we wired you on August 27th we would accept shipment under protest, we were not advised of certain matters that have since come to our attention concerning sugar market conditions. As we wired you on the 27th, it is possible that certain representations might have been made by you which were not in accord with the actual facts and it is therefore until we get further light on these facts that we are refusing shipment. You have another car 150 barrels on contract number 1080 and we now wish to give you notice not to ship same."

Lamborn & Company sent Small Company a day letter in reply:

"Wire received reference car Southern three hundred eight nine eight two this not subject to our disposition but yours. All demurrage your account."

On September 13th, the A. B. Small Company wrote Lamborn & Company:

"The sugar contracts that we had with you which we have cancelled read: Sold by Lamborn & Company, New York for the account of who it may concern. We advised you by wire on September 6th that car of sugar shipped to us was here subject to your disposition. You acknowledged this wire and stated that this was not subject to [fol. 90] your disposition but to ours and that all demurrage was for our account. We have rejected this car of sugar as you have been advised, but, for the good of whom it may concern, we would like to make a suggestion that you have this car of sugar stored and when the matter is settled, it will be a smaller loss to whomever is at fault in this matter; that is, the storage on this car of sugar would be a great deal less than the demurrage. Inasmuch as this car is your property until we accept same, we have no authority to order this car stored and your ordering same stored would not release any claim that you might have against us in enforcing any contract that you might have with us. The above is simply a suggestion on our part and you can do as you please regarding same."

Replying on September 15, Lamborn & Company wrote:

"Your letter of September 13th received and noted. The expression for account of whom it may concern at the top of the contract which you signed should not occasion any confusion in view of the fact that the name of the seller, as well as the name of the broker, appears at the bottom of the contract, side by side with the name of the buyer. As to your remark that your contracts are cancelled, we respectfully suggest that the cancellation of a contract is an act requiring the mutual consent of both parties to the contract. Since this sugar market has declined, it suits you to cancel the contract. For the self-same reason it does not suit us at all to cancel the contract and we most emphatically will not and do not consent to any cancellation. In order that there may be no misunderstanding, please understand that Lamborn & Company will hold you responsible for

all damages resulting from this violation of your contract obligations. Unless we can find an immediate sale to someone else of this sugar, and can thereby avoid rehandling expense, we will store it until a resale can be made. A resale will be made as soon as possible and at your risk and for your account and you will be held responsible for the difference between the contract price and the price obtained on resale, as well as for any other losses or expenses resulting from your breach of contract. Any representations from us were based on conditions then prevailing and were supported by the opinions of those best informed as to the sugar situation. Naturally, we did not make and could not have made any guaranty as to whether the price of sugar would go up or down. If we had information of suffi- [fol. 91] cient accuracy to form the basis of a representation of that kind we would very soon afford to retire your business. We should like to be advised by next mail as to what you propose to do regarding the remainder of your contracts. We are authorized by the contracts to make shipments now. Your sugar is ready to go forward. In our contracts you agree to furnish assortments when called for by the sellers. The sellers call for your assortments now. Please let us have them."

On September 18th, the Small Company replied:

"We acknowledge yours of the 15th, and are glad to have your explanation of vaious mentioned *mentioned* therein. We note that you state the only reasonable thing to do is for the sugat to be stored and we quite agree with you and, as before suggested by us, we now suggest again that this sugar be stored at once. In the meantime, for the good of whom it may concern, we would suggest that the sugar be stored."

[fol. 92] On the same day Lamborn & Company wrote to A. B. Small Company as follows:

"You have contracted with Lamborn & Company, New York, for certain sugars, the September portion of which has been ready and is now ready to go forward, and shipments have not been made because of your failure to furnish us with shipping instructions, notwithstanding our request for same. We give below the contract number and the approximate amount due to be shipped against contracts during this month: Contract No. 672, 50 barrels, basis 25.50-A. Contract No. 1080, 100 barrels, basis 25.50-B. Under the terms of the above mentioned contract, the sellers are authorized to ship now all the remaining sugars due you, and the sellers elect to ship now. You agree in your contract to furnish assortments when called for by sellers. The sellers call for your assortments now and we must insist that you let us have shipping instructions upon receipt of this letter."

Mr. Small replied on September 20th:

"We acknowledge your circular of September 18th referring to contracts 672 and 1080. We wrote you on Saturday and we hope to

have the pleasure of seeing you in your office and discussing these matters with you and are now simply awaiting a reply to that letter."

On September 21st, Lamborn & Company, writing to A. B. Small Company, attention of Mr. R. B. Small, say:

"Your letters of September 18th and 20th have been received. We will be very glad to see your representative at this office and discuss the situation thoroughly. This office has authority to act for Lamborn & Company."

The letters from Lamborn & Company all appear to be signed by Ody H. Lamborn, initials OHL being on practically all of them.

On the 25th Mr. Small writes:

"Confirming my interview with you on last T-ursday, I will state that I have rejected sugar shipped to me over my protest and have also stated that I would not accept any other shipments from you on any so-called contract or option signed by me. The above refers to the A. B. Small Co. of which the writer is president. You stated in our interview that you would sue me and I replied that therefore I would have nothing to do but stand up for what I thought were my rights in the matter."

On September 27th, a day telegraphic letter was sent by Lamborn & Company to the A. B. Small Company:

"You have not yet ordered out sugar still due you under your contracts with us as follows: Contract number six seven two dated [fol. 93] April 30th, fifty barrels due. Contract number ten eighty dated May seventh, one hundred barrels due. All above contracts being made in year nineteen hundred and twenty stop. You contracted to furnish assortments when called for by sellers. We have repeatedly called for and now demand your assortments since contract shipping period is rapidly expiring. Failure by you to furnish assortments and to order out your sugar by wire or mail within next forty eight hours will force us to treat contracts as broken by you and will compel us to sell your sugar for your account and at your risk and hold you for any difference between contract price and price obtained on resale as well as for any other loss, expense or damage which we may sustain through your breach of contracts."

On September 27th, Mr. Small acknowledged that wire and wrote to Lamborn & Company:

"We acknowledge your wire of September 27th leaving Savannah at 3.13 P. M. and reaching us at 4.04 P. M. This wire calls for shipping instructions on certain sugars. We advised you by wire several weeks ago that a certain car of sugar which you had shipped us under protest had been rejected. We told you personally in your office on Thursday, September 23rd, that we would not accept any more sugars from you under any so-called contracts or options. We

wrote you the same thing after our return to Macon, confirming our statement to you in Savannah, and we now beg to confirm the whole thing all over again, and will state positively that we will not accept the car of sugar shipped by you over our protest, nor will we give you any more shipping instructions on any other sugars and if you should ship any sugars to us on these contracts, we will reject them. If you think you have any right to sue us, you can proceed just as you like and there will be nothing for us to do but to defend our rights as we understand them."

On September 30th, Mr. Small wrote again:

"In further reply to your wire of September 27th, we beg to state that we have no contract with you to sell us any sugar, but only an option and that it is not binding and that is the reason we have not ordered out sugar as we do not feel that we are obligated to do so. You will therefore understand that we do not expressly or impliedly submit to any action you may take as indicated by your telegram of September 27th, in selling any sugar for our account. We deny your authority to do so."

Telegraphic day letter on October 11, 1920, addressed to the A. B. Small Company and signed Lamborn & Company:

"Have obtained offer of eleven and thirty-six hundredth cents per pound net, f. o. b. Macon for seventy-five barrels, two hundred sixty-two bags now in warehouse applying your contract numbers 672 and 1080. This offer best obtained and subject to immediate acceptance. Unless you furnish us better offer before three P. M. October [fol. 94] 11th, 1920, will accept the above offer and sell sugar at that price your account stop. In accordance our notice heretofore given you will hold you for difference between contract price and price obtained for resale as well as other losses, expenses or damages sustained reason for failure to take and pay for sugar in accordance with contract."

On October 11th, Mr. Small replied by telegram:

"We deny having any valid contract with you. We deny your authority to sell any sugar for our account. Sugar on option with you shipped over our protest was refused September sixth."

On October 12th, Lamborn & Company wrote to the Small Company:

"Upon your refusal to give us better bid than 11.36 cents per hundred on the 75 barrels and 262 bags now in the warehouse applying against your contract numbers 672 and 1080, we accepted bid offered us of 11.36 per hundred pounds net f. o. b. Macon which we advised you we had obtained in our letter of October 11th. You will find enclosed copy of sales ticket covering this sugar, which was sold to Kingman & Everett of your city. As previously advised, this offer was the best bid we were able to obtain on the sugars in ques-

tion, which was sold for your account, and in accordance with notice heretofore given you we will hold you for the difference between the contract price and the price obtained from resale, as well as all other losses, expenses, or damages sustained by reason of your failure to pay for the sugars in accordance with your contract."

That letter had reference to the sugar which had already been shipped to Macon.

On October 15th, Lamborn & Company wire the Small Company again:

"We have obtained an offer of eleven cents net f. o. b. Savannah Refinery, Port Wentworth, Georgia, for 150 barrels sugar due under your contracts number 672 and 1080. This offer is best we are able to get and is subject to immediate acceptance. Unless therefore you furnish us a better offer before nine A. M. October 16th, 1920, we shall accept the above offer and sell this sugar at that price and for your account and in accordance with our notice heretofore given you will hold you for the difference between contract price and price obtained on resale as well as any other losses, expenses or damages sustained by reason of your failure to take and pay for sugar in accordance with your contract."

On October 15th, Mr. Small acknowledged receipt of that telegram in this letter:

"We acknowledge your wire of October 15th, and in reply thereto [fol. 95] will state that we do not acknowledge having any valid contracts with you, nor do we acknowledge your authority to sell any sugars for our account. You have been advised by word of mouth, by letter and by telegram several weeks ago as to our attitude regarding the so-called contracts or options."

On the 16th, Lamborn & Company wrote the Small Company:

"Not having received from you a better bid than 11 cents net f. o. b. Savannah Refinery for the equivalent of 150 barrels due under your contracts Nos. 672 and 1080 we have accepted the bid which we advised you we had received, in our letter of the 15th, and sold the sugar at the above mentioned price. Copy of sales memorandum you will find enclosed. Statement will follow in due course showing amount due us by you for the difference between the contract price and the price obtained on resale, plus all other losses, expenses, and damages sustained by us through your breach of contract."

Enclosed in the first letter was this sales memorandum showing that the A. B. Small Company sold the sugar to Kingman & Everett of Macon through Ruan & Company as Brokers, for the account of the A. B. Small Company.

Sales memoranda admitted without objection. These are set out as exhibits to plaintiff's petition and therefore are not again copied.

On November 5th, Lamborn & Company wrote to A. B. Small Company:

"We beg to refer you to our letter of October 16th in which we advised you that we had sold 150 barrels due under your contracts Nos. 672 and 1080 with Lamborn & Company, New York, at basis 11 cents f. o. b. Savannah Refinery. The second hand sales memo which was enclosed in our letter of the 16th showed that this sugar was sold to Kingman & Everett of your city. Owing to a slight delay in getting this order shipped from the refinery, Kingman & Everett were obliged to purchase sugar through other channels and for this reason advised us they would refuse to take the shipment. At the time this information was received, the car had already been shipped from the refinery and was on its way to Macon and we advised our representatives, Messrs. Ruan & Company, to take care of this sugar, put this sugar in storage and secure some buyer promptly as possible. We enclose herewith a copy of the sales memo. covering the purchase of this sugar after it had arrived at Macon. You will note that Kingman & Everett are again the buyers of this sugar, but you will note that the purchase price on this sale is 11¼ cents net f. o. b. Savannah Refinery, which is ¼ cent higher than the price at which we originally sold them, plus the storage charge of $41.95, covering the storage on this sugar from the date of arrival in Macon to the date of resale. This storage charge was paid by Lamborn & Com-[fol. 96] pany of New York, to enable Kingman & Everett Company to get the sugar promptly. This storage charge paid by Lamborn & Company of New York will be charged to your account for collection. Statement will follow in due course showing the amount due us by you for the difference between the contract price and the price obtained on resale, plus all other losses, expenses, or damages sustained by us through your breach of contract."

January 22nd, 1921, letter written by Lamborn & Company addressed to the Small Company at Macon:

"Referring to the sugar which you contracted for and failed to take, and which we resold for your account, after due notice to you. We are enclosing herewith itemized statement showing amount you are due us, for which sum, plus accrued interest at 7% per annum, please let us have your check by early mail."

Accompanying that letter was a statement, a copy of which is attached to the petition, showing the amount of the losses, including the expense items, all amounting to $15,218.14.

The next letter is from the attorneys demanding payment of the claim.

The last letter closing the correspondence is addressed to Lamborn & Company from A. B. Small Company:

"You are hereby notified that we do not acknowledge any liability whatsoever to you and that we owe you nothing on open account or otherwise."

This letter is dated February 9th.

[fol. 97] Plaintiff tendered in evidence the application for license to the United States Food Administration on behalf of Lamborn & Company, a partnership of Wall Street, New York, the Application being for a license to handle sugar as a commission merchant, and as a broker, also to import sugar. The original license was not offered, it having been lost.

The failure to offer the original license was not objected to but defendant objected on the ground that neither a license as a commission merchant nor a license as a broker or importer fits the particular business here. There is a blank here as a wholesaler and jobber, which defendant contends fits the business here and the license as commission merchant, broker or importer not covering this particular business. Defendant objected to it as irrelevant and immaterial, and because the right to import sugar does not include the right to sell sugar in America and a license to import does not authorize the business that was contracted in this particular case.

The Court overruled the objections, and defendant noted its exceptions. These exceptions were then and there allowed and are here and now presented, allowed and sealed.

Application for a license as commission merchant and broker and license to import sugar were admitted but not necessary to be copied

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O. H. LAMBORN sworn for plaintiff:

Direct examination:

Mr. Park: Partners named agreed to be as pleaded.

"I am Ody H. Lamborn, Orange, New Jersey, and was connected with the firm of Lamborn & Company of New York in the summer and fall of 1920, and am still connected with that firm. The latter [fol. 98] part of 1920 I was located at our Savannah, Georgia, office as manager. I supervised the office. The letters read to the jury a while ago that bear the initials OHL were dictated by me. I had general charge of sales of sugar and the handling of business for Lamborn & Company through their Savannah Office. I was familiar with the shipments made under the contracts in this case. It was part of my duty to supervise the handling of those matters. I was familiar with the shipments of the last two cars, the 150 barrels that were shipped in—both of them I believe in August, or one in August and one in September. The resales of that sugar, the car that was sold in Macon and the car that was shipped from Savannah and afterwards sold in Macon, were sold under my direction. I am familiar with this statement that was submitted to Mr. Small and that is a correct statement of the amounts realized from the resales and a correct statement of the account as shown by the original contract and the amount realized on the resale. The balance due according to that statement is $15,218.14, not including interest. The demurrage items were expended on account of the rejection of this sugar and the rehandling. I am familiar with the

conditions that prevailed in the sugar trade during the summer and fall of 1920.

"The market had been advancing since the early part of the year until June and July; in July it steadied somewhat and did not continue its advance and then in the early part of August began to decline and continued its decline until the end of the year. The decline after that time was somewhat slow at first, but as the season progressed it was more rapid until the latter part of October there was a slight improvement in the market, but that was only temporary and it began to decline again after that time. The market reached its highest point in June, and the price refiners were quoting—the highest I know of—was 26 cents for sugar, but it was [fol. 99] supposed to have sold at even higher prices than that. It went down to about 8 cents a pound I believe, towards the end of the year. There was a gradual decline then from early in August until the latter part of December from 26 cents or about that, down to about 8 cents. There was practically no demand during the summer months—during August, September and October—because practically all the trade was supplied with sugar they had bought in the spring and early summer, but about November and December the situation was somewhat improved, although not a great deal, because some of the old stocks were being cleaned up. It was not feasible to put on the market any considerable amount of sugar during the latter part of August, September and October.

"The second car of Mr. Small's sugar was shipped on August 30th—he had accepted the first car and paid for it, and he declined this car I think on the 6th or 7th of September and the car was put in storage as per his suggestion; the contract expired September 30th and we then made effort to sell the sugar for Small's account; we made that effort through our brokers here and elsewhere. The car was put on storage here in Macon, but during the first two weeks in October we did our best to sell it, but we were not able to sell it until about the 15th. The contract time for delivery expired September 30th. I undertook to sell the sugar through the Macon brokers, and tried to interest other brokers in it. I sold that sugar as soon as I could get an offer for it. The same situation applied to the third car; we made effort to resell that and it was sold, I think, the latter part of October—on or around the 15th I think. The statement won't exactly tell when sales were made because you recall the third car was purchased by a concern here and before it arrived they turned it down and we ultimately sold it to the same people [fol. 100] at a quarter of a cent higher price.

"As I said before, the market improved; there was a little spell in there when the market temporarily improved; I think I said it was the early part of November, but it was along in that period; the market very quickly went down again but we managed to get this offer of 11¼ cents. I used my best efforts to get a good price for that sugar, just the same as if it was our own. We got the market price.

"I have been in the sugar business for the past twelve years and I have kept in close touch with the conditions and market prices—

the raw sugar prices and the prices made by refiners—but I have with me Willett & Gray's Weekly Statistical Journal which is recognized internationally and nationally as authority on sugar prices and I can testify from this publication as to the market price on September 30th. Willett & Gray are not affiliated with any refiner or producer. Their Journal gives the quotations from the different refiners."

Q. I ask you to look at this weekly statistical sugar trade journal dated January 13, 1921, giving the fluctuations in the sugar prices during the year 1920; refer to it and give us the price if you can——

Mr. Saussy: We object to it on the ground that it is only quotations and quotations do not prove market price. I think unless the Journal shows sales of actual sugar consummated at those prices, it would not produce a market.

The Court: If it was quoted too high to make a sale, I think it would be in your favor.

Mr. Saussy: We will have to take the consequences if it goes [fol. 101] against us, but we will stand by the position that a quotation is not a market.

The Court: Does it say it is a quotation from the refiner. I don't see where it says it is quotations from refiners only. Can you show me something to show it is not based upon a fact; it seems to be the quotation of prices.

Mr. Park:

Q. Mr. Lamborn what was the price of sugar on September 30th?

Mr. Saussy: We object to that unless it is confined to South Georgia; the price should be in South Georgia as the place of performance of these contracts was in South Georgia and I don't think this journal shows the price at Savannah on September 30th.

The Court: I don't think that would be sound because it might be quite practical to prove markets by proving it in New York plus the freight or prove that it was generally true that the market at New York and Savannah was generally the same.

Mr. Saussy: We note an exception to the ruling.

The exception was then and there allowed and is here renewed allowed and ordered sealed.

Mr. Park:

There is no sugar exchange or any source for getting sugar quotations in Savannah. The freight rate from New York to Savannah is approximately 16 cents per hundred pounds as compared with five cents per hundred pounds which the Savannah Sugar Refinery charges the Savannah jobbers for delivery from the refinery to Savannah, making a difference of 11 cents per hundred pounds.

[fol. 102] "The price in New York and Savannah are practically the same with the exception of the freight. I was familiar with the

prices in Savannah during 1920. From my knowledge of those prices and by refreshing my recollection by reference to Willett & Gray's quotations, the market value of sugar in Savannah on September 30th was 12.7 cents per pound. I have before me the publication of October 2, 1920, issued by a journal named Facts About Sugar, which is an independent publication. It is recognized in the sugar trade. The price shown in that for September 30th is 13 cents less 2% for cash. Willett & Gray's quotation on October 1st as of September, they have under refined sugar heading this: Federal's price of 13 cents is the lowest refiner's basis, but sugars from second hand can be obtained at the same quotation. Arbuckle and Howell continue to quote 14 cents but we understand that the former is quietly meeting competition. Second hands are the same quality of sugar, but are sugars that have been purchased by a wholesale grocer who finds himself overstocked or something and desires to sell them, and they are simply termed in the trade second hands, but that does not mean they are of an inferior grade. These sugars of Mr. Small that were sold to Kingman & Everett would be termed second hands, although it was in the original packages and just like it left Savannah."

[fol. 103] Cross-examination.

Mr. Saussy:

"None of these quotations I read were Savannah quotations. The Savannah Sugar Refining Corporation was withdrawn from the market in September, 1920, and Lamborn & Company were withdrawn, too. We never made any sales in September and October except resales. We had contracts with other people in September and October, 1920, where they did not take the sugar that was called for by those contracts, I guess a hundred at any rate. There was more than a million pounds involved in those contracts.

"On September 27th, I sent a telegram to every one of these contractors and told them I expected to act as agent to sell their sugars. The Small contract expired on September 30th and after that I tried to sell the sugar. I didn't try to sell it up to September 30th. I didn't do anything for 24 days although I was notified by Small that he would not take it. After September 30th we took the matter up with our brokers and asked them to do their best to sell it. As to the 150 barrels that hadn't been shipped, we tried not only to sell that through our brokers here, but also through our brokers at Atlanta and Columbus and a few other places. The letter I sent out to the trade is dated October 14, 1920.

"That is not the first effort that I made from September 6th, or after September 6th, to resell this 150 barrels that had not been shipped to Macon, because any business that had come in to us during the first two weeks in October, if there had been a demand, we would have applied against this Small sugar that had not been shipped. We made no effort to sell this specific sugar; we didn't pick out anybody's sugar first; we did our best to get orders and when

we got the orders, we applied them against the repudiated sugars. [fol. 104] We cancelled contracts with some of our customers and took back the sugar, but that was transferred. If we repurchased sugar during September, that sugar was delivered on other contracts we had expiring in September or October, and when we switched them or transferred it, we had that much less raw sugar coming to Savannah and we sent it to New York or some place else. We had enough in Savannah to supply the contracts we had. We had contracts that didn't expire until October 31st. We imported from Cuba pound for pound all the sugar we had contracted for in 1920. I don't know what we paid for that sugar.

"I am the manager and the only representative of Lamborn & Company in Savannah. I did not fix the price at which this sugar was to be sold to customers. I got that from New York. I have not endeavored to find out what they paid for this sugar. I have never asked the question. I do not know what the Savannah Refinery was paying for importation of raws in 1920. Our offices were very close to each other. We were selling to the same customers that the Savannah Sugar Refinery was selling to. We were not competing with each other. Most of our contracts expired September 30th and October 30th and the Savannah Refinery sold for later delivery that year. We were cooperating with each other. We always cooperate. Lamborn & Company never did own a refinery during this time nor did they hold themselves out as refiners. So far as I know all these importations were made in the customs house in the name of the Savannah Sugar Refinery. I think they handled it. I am contending for refiner's prices in these cases. I admit we did not own a refinery in 1920, but we were acting in the same sense as a refiner; we rented a refinery and paid toll to the Savannah Refinery. I think the toll was two fifty per hundred pounds. That included their profit on refining the sugar. The refiner's profit had been taken out [fol. 105] of the sugar when it was turned over to us. We had a lot of sugar on hand to distribute to the public on these contracts; we had some contracts for 30 or 40 barrels, but we sold strictly to the wholesale grocers or the manufacturers.

"What we did was this: as soon as we knew the amount that had been repudiated on September 30th, realizing that it was a great amount, we did not let it be known outside of our office the amount we had for sale because if we had it would have broken the market considerably. We did, however, get out circulars and write our brokers advising them that we had sugar to offer and in each specific case where we had sugar repudiated we told them we would like to have bids on the repudiated sugar. It happens in this case there was practically no change, but it makes no difference, there was no demand for sugar then.

"We didn't write these letters on October 1st for this reason: We sent out circular letters advising the trade that we had sugar for sale at the then market price; we at that time wanted to get the full market price if we could because our lawyers told us we had to get the highest possible prices; we had bids that were absolutely ridiculous

that we turned down peremptorily, simply because we were not going to give the sugar away. We tried to sell this sugar in Columbus, Macon, Atlanta, Athens, and various other cities. We had a salesman who was keeping in close touch with the Savannah trade and he was every day trying to sell to the trade in Savannah.

"If a man lived in Atlanta and repudiated his contract, we would take it up with the surrounding trade; if a man lived in North Carolina, we would try to sell the sugar there; it wouldn't have done to have written to all the Georgia trade on every repudiation it made; [fol. 106] we tried to distribute it so we would get a good price. At the time we sold the Small sugars we were acting as agents part of the time for the Savannah Refinery in making the sales of sugar that had been rejected by their customers. Their resales were not made until after the expiration of their contracts. We were undertaking to resell for other people; we had more than this sugar to sell.

"That letter of October 12th is the first formal effort we made to sell the sugar of the Small Company. We made two sets of contracts, some expiring September 30th and some October 30th. If we repurchased from a man whose contract expired September 30th, that same sugar may have been shipped on a contract that did not expire until October 30th, which would make it possible to divert some raws from Cuba to New York. I don't know whether or not we had any raws coming into Savannah after September 30th.

"Suppose we repurchased some sugar; we then had raw sugar, we will say we had raw sugar en route or to be shipped from Cuba which we were going to have refined for delivery against our contracts which expired in October; we repurchased part of our September contracts; that relieved us of a certain amount we were going to deliver and we simply had that in the warehouse to deliver against our October contracts, and we diverted the raw sugar coming from Cuba to New York."

[fol. 107] Mr. Watkins: Referring to the copies from the books showing resales of sugar during October, November and December of 1920, the first date on which a resale was made was October 6th.

"Prior to that date there were no resales of any of the declined sugar. The notices I sent out for this particular sugar, seeking to obtain purchasers of it, are dated October 14th. This sale of the 6th was sold in Augusta and it may have been that there was a smaller demand in that locality than in Macon. This car sold to Small was here in Macon and to have shipped it to Augusta would have involved additional loss to Small.

"This sugar we sold in Augusta on October 6th, was at Aiken, South Carolina, which, as you know, is across the river from Augusta. As I explained yesterday, we were sending out either daily or weekly letters offering sugar to our trade, numbering something like 1,600 in the southeast; we did not tell them they were second hand sugars or repudiated sugars because that would have caused us to get a lower price for them. Those general letters did not offer sugars. Prior to September 30th, we made no offerings; that is during the month

of September; on and after October 1st, our letters did contain quotations and offerings of sugars. I have none of those letters with me. During September, I did not make any kind of offerings of sugar, either of our own or resale sugars. It was on or after October 1st that we began making offerings; the circulars always go out.

[fol. 108] "None of those circulars made any specific reference to any particular sugar. We got no results from any of those circular letters early in October. Prior to October 14th we made a few sales on the 8th, 11th, and 13th, but there was no demand at that time. We did not use any particular method to distinguish which particular man's sugar we would sell. It was just a kind of hit or miss proposition. We did have a lot of sugar at that time that we had to sell, but we sold A. B. Small's sugar among the very first.

"I think if this sugar had been in the hands of ten people or twenty, we would have had a much more demoralized situation, because we could handle it in an intelligent manner and not demoralize the market as would have been the case if more people had been handling it, and we were probably more familiar with the trade in the Southeast than any other broker; and, furthermore, we have something like 50 brokers in the southeast through whom we sell sugar, and if there had been any demand we would have gotten it because they are the leading brokers in the southeast. Other sales on the 8th, one on the 11th, 3 on the 13th, one on the 14th, were all prior to the sending out of letters with reference to the Small sugars, but bear in mind that we had the car of sugar in Macon and we had our broker here who was very competent and he had been doing his best for two weeks to sell this sugar.

"Other sales were made two on the 12th, 2 on the 13th, and 6 on the 14th, in North Carolina and Georgia, some in Savannah, some in Augusta, some in Dublin, and some in Elberton. As to the car in Macon, we would not have shipped from Macon to Savannah the [fol. 109] Macon car; that would not have been good business in the interest of Small, and as to shipping to Dublin or Elberton or Durham or Greenville, it would not have been good business to ship the car from Macon to any of those points because we would have entailed additional expense on Mr. Small's account. We got just as much for the sugars at the refinery as we would have gotten if we had sold it five or — days earlier; it made no difference in a monetary way whether we sold it on the 11th or the 14th."

Witness identified pages as correct transcripts from plaintiff's books, showing the resale of sugars, which pages being material to this issue are here inserted and are as follows:

(Here follows Exhibit to Lamborn's testimony, marked side folio pages 109a and 110)

Resale of Sugars Ship

| Seller | Bbls. | Bags | Price |
|---|---|---|---|
| Savannah Flour & Feed Co., Savannah, Ga. | 82 | 284 | 11¾ cts. |
| J. E. Helfrich & Son, Savannah, Ga. | 25 | ... | 11 cts. |
| Verenes Brothers, Aiken, S. C. | 40 | 138 | 12½ cts. |
| A. B. Small & Company, Macon, Ga. | 75 | 262 | 11.36 cts. |
| Griffin Candy Company, Griffin, Ga. | 100 | ... | 11½ cts. Less 2% f. o. b. Griffin |
| Wates Grocery Company, Griffin, Ga. | 13 | 39 | 11 cts. Less 2% Ex-Whse. |
| Morristown Gro. Co., Morristown, Tenn. | .. | 437 | 11½ cts. Less 2% |
| Richmond Gro. Company, Augusta, Ga. | 47 | 160 | 11 cts. Less 2% Ex-Whse |
| Tyler Grocery Co., Jacksonville, Fla. | .. | 119 | 10 cts. Net Jax. Ex-Whse |
| C. E. Guller Co., Jacksonville, Fla. | 53 | 17 | 10 cts. Net Jax. Ex-Whse |
| United Produce Co., Jacksonville, Fla. | 101 | 346 | 10 cts. Net Jax. Ex-Whse |
| Cumberland & Liberty Mills Co., Jacksonville, Fla. | .. | 315 | 10 cts. Net Jax. Ex-Whse |
| Taylor Grocery Co., Newport, Tenn. | .. | 430 | 11 cts. Less 2% f. o. b. Knoxville |
| Taylor Grocery Co., Newport, Tenn. | .. | 466 | 11 cts. Less 2% f. o. b. Knoxville |
| Morristown Gro. Co., Morristown, Tenn. | .. | 525 | 11 cts. Less 2% f. o. b. Knoxville |
| Newnan Grocery Co., Newnan, Ga. | 25 | 87 | 11 cts. Less 2% f. o. b. Newnan |
| Hollingsworth & Hatch, Sanford, N. C. | 12 | 49 | 11 cts. Less 2% f. o. b. Refinery |
| Merritt, Reel & McElmurray, Augusta, Ga. | .. | 215 | 10¼ cts. Less 2% f. o. b. Augusta |
| W. C. Dorsett Company, Macon, Ga. | 33 | ... | 8½ cts. Less 2% f. o. b. Macon |
| Peoples Grocery Co., Cordele, Ga. | .. | 238 | 9 cts. f. o. b. Cordele |
| Brown & Avery, Miami, Fla. | 5 | 17 | 10½ cts. f. o. b. Savannah |
| La Grange Grocery Co., Lagrange, Ga. | .. | 50 | 11 cts. f. o. b. Nashville |
| La Grange Grocery Co., Lagrange, Ga. | .. | 135 | 9 cts. f. o. b. Nashville |
| La Grange Grocery Co., Lagrange, Ga. | .. | 100 | 9 cts. f. o. b. Nashville |
| La Grange Grocery Co., Lagrange, Ga. | .. | 50 | 9 cts. f. o. b. Nashville |
| La Grange Grocery Co., Lagrange, Ga. | .. | 35 | 9 cts. f. o. b. Nashville |
| La Grange Grocery Co., Lagrange, Ga. | .. | 50 | 9 cts. f. o. b. Nashville |
| Holloway-Smith Co., Cedartown, Ga. | .. | 61 | 8 cts. Less 2% f. o. b. Cedartown |
| Holloway-Smith Co., Cedartown, Ga. | .. | 35 | 10 cts. Less 2% f. o. b. Cedartown |
| Denmark Whsl. Gro. Co., Denmark S. C. | 12 | 50 | 8¾ cts. Less 2% f. o. b. Savannah |
| Bludwine Bottling Co., Columbia, S. C. | 50 | ... | 8 cts. Less 2% f. o. b. Columbia |
| Bludwine Bottling Co., Columbia, S. C. | 30 | ... | 8 cts. Less 2% f. o. b. Columbia |

[fol. 110]

Resale Bad Accounts

| | | | |
|---|---|---|---|
| A. Ehrlich & Bro. Gro. Co., Savannah, Ga. | .. | 434 | 11 cts. Less 2% |
| The Cassels Company, Savannah, Ga. | 10 | 308 | 11 cts. Less 2% |
| Cooper-Bracey Gro. Co., Thomasville, Ga. | .. | 240 | 11½ cts. Less 2% |
| C. E. Guller Company, Jacksonville, Fla. | .. | 108 | 11 cts. Less 2% |
| Williamsons, Inc., Burlington, N. C. | 50 | 330 | 11 cts. Less 2% |
| J. J. Lissner, Brunswick, Ga. | 50 | 175 | 11½ cts. Less 2% |
| Moultrie Grocery Co., Moultrie, Ga. | 100 | ... | 11 cts. Less 2% |
| Waynesboro Gro. Co., Waynesboro, Ga. | .. | 396 | 11 cts. Less 2% |
| Wofford-Terrell Co., Murphy, N. C. | 151 | ... | 11 cts. Less 2% |
| J. C. Slater, Savannah, Ga. | 14 | 100 | 11 cts. Less 2% |
| The A. B. Small Co., Macon, Ga. | 40 | 385 | 11¼ cts. Net f. o. b. Refinery |
| J. W. Bell, Spartanburg, S. C. | 57 | 400 | 11 cts. Less 2% |
| Florida Bludwine Bot. Co., Jacksonville, Fla. | 25 | 263 | 11 cts. Less 2% |
| Snider & Company, Salisbury, N. C. | .. | 600 | 11 cts. Less 2% |
| P. A. Reavis & Company, Louisburg, N. C. | .. | 425 | 11 cts. Less 2% |
| Adams Brothers Co., Macon, Ga. | 7 | 24 | 11⅛ cts. Net |
| Millen Grocery Co., Millen, Ga. | .. | 600 | 11 cts. Less 2% |
| F. R. Hartsfield Co., Gainesville, Fla. | .. | 262 | 11 cts. Less 2% |
| Moses Grocery Company, Ocala, Fla. | .. | 280 | 11 cts. Less 2% |
| | [504 | 5330]* | |
| Woodruff Feed Company, Anniston, Ala. | .. | 450 | 11 cts. Less 2% |
| Angelo Brothers, Winston-Salem, N. C. | .. | 350 | 11 cts. Less 2% |
| Lake City Grocery Co., Lake City, Fla. | 64 | 300 | 11 cts. Less 2% |
| Waynesboro Grocery Co., Waynesboro, Ga. | .. | 620 | 11 cts. Less 2% |
| Cumberland Candy Co., Fayetteville, N. C. | 25 | 263 | 11 cts. Less 2% |
| A. Ehrlich & Bro. Gro. Co., Savannah, Ga. | 25 | 528 | 11 cts. Less 2% |
| Williamson's, Inc., Burlington, N. C. | 32 | 322 | 11 cts. Less 2% |
| F. D. Forester & Co., N. Wilkesboro, N. C. | 50 | 315 | 11 cts. Less 2% |
| Harrison Whsl. Gro. Co., Williamston, N. C. | .. | 700 | 11 cts. Less 2% |
| Toisnot Grocery Co., Elm City, N. C. | .. | 200 | 11 cts. Less 2% |
| La Grange Grocery Co., La Grange, Ga. | .. | 410 | 11 cts. Less 2% |
| | [700 | 9788]* | |
| Forest City Ice Cream Co. (Chat.) Savannah, Ga. | .. | 500 | 11 cts. Less 2% |
| Albemarle Grocery Co., Albemarle, N. C. | .. | 350 | 10¾ cts Less 2% |
| [illegible] | | 240 | 11 cts. Less 2% |

hipped

| | Buyer | Thru | Date |
|---|---|---|---|
| ..... | Cone M. Maddox, Atlanta, Ga..... | Raley ..... | Oct. 8th |
| ..... | E. T. Sheftall & Co., Savannah, Ga..... | Direct ..... | " 8th |
| ..... | Augusta Gro. Co., Augusta, Ga..... | Barksdale ..... | " 6th |
| ..... | Kingman & Everett, Macon, Ga..... | Ruan ..... | " 11th |
| ..... | L. W. Rogers Co., Atlanta, Ga..... | Raley ..... | " 13th |
| ..... | Augusta Gro. Co., Augusta, Ga..... | Barksdale ..... | " 13th |
| ..... | Kenny, Little Rock, Ark..... | Direct ..... | " 13th |
| ..... | Augusta Gro. Co., Augusta, Ga..... | Barksdale ..... | " 14th |
| ..... | Lewis-Chitty Co., Jacksonville, Fla..... | Saussy ..... | " 15th |
| ..... | Lewis-Chitty Co., Jacksonville, Fla..... | Saussy ..... | " 15th |
| ..... | Lewis-Chitty Co., Jacksonville, Fla..... | Saussy ..... | " 15th |
| ..... | Harmon-Hull Co., Jacksonville, Fla..... | Saussy ..... | " 15th |
| ..... | Kenny, Knoxville, Tenn..... | Direct ..... | " 15th |
| ..... | Jim Anderson Co., Knoxville, Tenn..... | Prosser ..... | " 15th |
| ..... | Jim Anderson Co., Knoxville, Tenn..... | Prosser ..... | " 15th |
| ..... | L. W. Rogers Co., Atlanta, Ga..... | Raley ..... | " 18th |
| ..... | Howard-Bobbitt Co., Sanford, N. C..... | Direct ..... | " 29th |
| ..... | Arrington Bros. Co., Augusta, Ga..... | J. L. B. ..... | Nov. 17th |
| ..... | Talmadge Bros. & Co., Athens, Ga..... | Steedman ..... | " 22nd |
| ..... | H. L. Barfield, Macon, Ga..... | Ruan ..... | " 19th |
| ..... | Hartsfield Gro. Co., W. Palm Beach, Fla.... | Clark ..... | " 22nd |
| ..... | Kenny, Nashville, Tenn..... | Morgan ..... | " 9th |
| ..... | Robert Orr & Co., Nashville, Tenn..... | Morgan ..... | " 23rd |
| ..... | J. H. Orr Co., Nashville, Tenn..... | Morgan ..... | " 23rd |
| ..... | J. H. Orr Co., Nashville, Tenn..... | Morgan ..... | " 26th |
| ..... | Orr, Jackson & Co., Nashville, Tenn..... | Morgan ..... | " 27th |
| ..... | J. H. Orr Co., Nashville, Tenn..... | Morgan ..... | " 27th |
| ..... | Capitol City Gro. Co., Atlanta, Ga..... | Raley ..... | " 23rd |
| ..... | W. E. Edwards & Co., Atlanta, Ga..... | Raley ..... | " 23rd |
| ..... | Merritt, Reel & McElmurray, Augusta, Ga.. | Barksdale ..... | " 30th |
| ..... | C. D. Kenny Co., Columbia, S. C..... | Direct ..... | Dec. 29th |
| ..... | C. D. Kenny Co., Columbia, S. C..... | Direct ..... | " 29th |

nts

| | | | |
|---|---|---|---|
| ..... | E. T. Sheftall & Co., Savannah, Ga..... | Direct ..... | Oct. 12th |
| ..... | Alexander Gro. Co., Savannah, Ga..... | Direct ..... | " 12th |
| ..... | Copeland Gro. Co., Elberton, Ga..... | Direct ..... | " 13th |
| ..... | E. S. Street & Co., Dublin, Ga..... | Direct ..... | " 13th |
| ..... | Kenny, Greenville, S. C..... | Direct ..... | " 14th |
| ..... | Kenny, Durham, N. C..... | Direct ..... | " 14th |
| ..... | Kenny, Augusta, Ga..... | Direct ..... | " 14th |
| ..... | Kenny, Augusta, Ga..... | Direct ..... | " 14th |
| ..... | Kenny, Atlanta, Ga..... | Direct ..... | " 14th |
| ..... | E. S. Street & Co., Dublin, Ga..... | Direct ..... | " 14th |
| ..... | Kingman & Everett, Macon, Ga..... | Ruan ..... | " 16th |
| ..... | Kenny, Birmingham, Ala..... | Direct ..... | " 16th |
| ..... | Kenny, Mobile, Ala..... | Direct ..... | " 16th |
| ..... | Kenny, Knoxville, Tenn..... | Direct ..... | " 16th |
| ..... | J. F. Goodson & Co., Morristown, Tenn.... | Direct ..... | " 16th |
| ..... | Adams Brothers Co., Macon, Ga..... | Ruan (?) ..... | " 16th |
| ..... | McCord-Stewart Co., Atlanta, Ga..... | Raley ..... | " 16th |
| ..... | Kelley-Brothers Co., Atlanta, Ga..... | Raley ..... | " 16th |
| ..... | Cone M. Maddox Co., Atlanta, Ga..... | Raley [(2027)]* ..... | " 16th |
| ..... | Anniston Merc. Co., Anniston, Ala..... | Crutchfield ..... | " 18th |
| ..... | J. H. Culbreth & Co., Fayetteville, N. C.... | Direct ..... | " 18th |
| ..... | Kenny, Charlotte, N. C..... | Direct ..... | " 18th |
| ..... | Kenny, Chattanooga, Tenn..... | Direct ..... | " 18th |
| ..... | Kenny, Columbus, Ga..... | Direct ..... | " 18th |
| ..... | Kenny, Gadsden, Ala..... | Direct ..... | " 18th |
| ..... | Kenny, Asheville, N. C..... | Direct ..... | " 18th |
| ..... | Kenny, Montgomery, Ala..... | Direct ..... | " 18th |
| ..... | Kenny, Lexington, Ky..... | Direct ..... | " 18th |
| ..... | Shipp Grocery Co., Americus, Ga..... | Direct ..... | " 18th |
| ..... | Cone M. Maddox Co., Atlanta, Ga..... | Raley [(3495)]* ..... | " 18th |
| ..... | Ragon Brothers, Evansville, Ind..... | Direct ..... | " 19th |
| ..... | Lexington Gro. Co., Lexington, N. C..... | Direct ..... | " 19th |
| ..... | Tifton Grocery Co., Fitzgerald, Ga..... | Direct ..... | " 19th |

[fol. 111] "At the same time we were selling this resale sugar we were acting as brokers for the Savannah Sugar Refinery and made sales of sugar for that company during the fall of 1920. I do not recall how much we sold for the Savannah Sugar Refinery from September 1st to December 31, 1920. I do not recall when we first began offering the Savannah Sugar Refinery's sugar after August 1920. This is a statement of the sales made for the Savannah Sugar Refining Corporation by Lamborn & Company as brokers. Lamborn & Company and the Savannah Sugar Refining Corporation had a joint credit department.

Redirect examination.

Mr. Park:

"While we did not send out any letter we got in touch with Mr. Ruan, our broker in Macon, prior to this general letter sent out to quite a number of brokers on October 14th, in an effort to get Mr. Ruan to dispose of this sugar. It is a fact that there were quite a number of rejections of these contracts expiring on October 1st, or September 30th. That threw into our hands a large amount of sugar that had to be disposed of for the account of these various purchasers. If we had thrown all of that sugar on the market for the best price we could have gotten I think sugar would have broken to five cents a pound; in fact we did have bids on some of this for five and eight cents a pound. We used our best judgment to get for these people for whose accounts we were selling sugar the best price obtainable. There was no discrimination in the Small case in holding this sugar. These sugars were sold among the first; I had a talk with Mr. Small and was apprised of his plan to get the wholesale grocers together to repudiate, and we took special pains to get rid of his right at first.

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[fol. 112] JOHN G. RUAN, sworn for plaintiff:

Direct examination.

Mr. Park:

"I am a member of the firm of Ruan & Company, doing business in Macon. We have a brokerage business, and among other lines sell sugar. That was true in 1920. At that time I represented as broker Lamborn & Company and the Savannah Sugar Refining Company. During that year, particularly beginning with August and running through September and October, the condition of the sugar market was that wholesale grocers had taken in high priced sugar, they had big stocks and there was no demand. It was very hard to sell sugar. There was no sufficient demand for sugar during the month of September and the early part of October. The amount that was bought was ordinarily just hand to mouth buying; a man only bought what he actually needed for a short period because the

price was going down. That condition existed during the month of October as well as during September. I handled the car of sugar shipped to A. B. Small Company that arrived here early in September for Lamborn & Company. That car was put into our warehouse on September 22nd; it was on track and rejected; we sold it on October 11th to Kingman & Everett. I got for the car 11.36 cents per 100 pounds net Macon.

"I think we were authorized to sell it the last of September or about the first of October and we tried very hard to sell it then; the first offer we could get was from Kingman & Everett on October 11th. It was the full market price; it was a good price. Sugar could be bought generally in the market for that price at that time. The full amount that I sold that car for is credited on the statement sued on.

"I have the original documents here in my hands. I also had to do with the sale of the third car. We sold that car October 15th to [fol. 113] Kingman & Everett at 11 cents net Savannah, and it was to be shipped immediately; it was not shipped in three days and Mr. Kingman wired or called up Savannah and cancelled the car, stating that he could buy it cheaper by 2% from the American. The car had been shipped however and was diverted to us and put in our warehouse; we sold that car on November 3rd to Kingman & Everett at 11¼ cents net Savannah; he paid us a quarter of a cent more; sugar had gone up a little, or he could use it to better advantage.

Both the first and second prices were the full market prices; we offered that sugar to every wholesale grocer here and that was the best price we could get, and I believe they could have bought other sugar for the same price. I was familiar with the market at that time. I had trouble in selling the car. As I remember, we *we* authorized to sell it around October 1st, and we sold it on October 11th. The third car was sold to Kingman & Everett the first time on November 15th; we were also authorized to sell that on November 1st. At that time one car of sugar was a good deal of sugar in this market.

"I am familiar with Willet & Gray's quotations. They are regarded as high authority in sugar. The prices quoted in Willett & Gray's Journal are regarded as standard prices. There is very little difference between the quotations made by Willett & Gray from New York and the prices obtained in Savannah, where the Savannah Sugar Refinery is located. There is sometimes a variation of ten points; ordinarily the New York refiners will name a price and Savannah meets it in a day or two. The New York price is regarded as the ruling or controlling price. There is no difference in standard [fol. 114] fine granulated sugar. The sugar made by the American and put up under the Domino Brand and the Savannah sugar called Dixie Crystal is all the same. Standard fine granulated sugar is identical, practically so."

Cross-examination.

Mr. Watkins:

"I did not sell any sugar in August 1920 that I recall, nor did I sell any in September, 1920. We don't keep our records ordinarily that far back but I imagine they are in the office somewhere. I could tell from our books what sugar we sold in August and September, 1920. I don't know that I could do it very easily; I don't think we sold any.

"I got these instructions to sell this sugar October 1st, but I have not the letter with me or telegram, giving the instructions to sell this sugar. I have those instructions somewhere—but I didn't bring them up here; I have told the jury you retained this file, and these are important parts of it; the instructions to sell this sugar. I didn't know it was necessary; those instructions might come in a circular letter or over the phone or by wire. I haven't made any effort to find those instructions. I do not think the instructions to sell this particular sugar would come in a circular letter, so I must have some instructions to sell this particular sugar. I am still the broker for Lamborn & Company and also for the Savannah Sugar Refinery. Through Lamborn & Company I recall that I sold in October 1920 these two cars only. I made these particular contracts that are sued on with Small."

Redirect examination.

Mr. Park:

"I said that this car was sold—both of these cars were sold—but they were stored for a time with Ruan & Company; the statement shows the correct storage and unloading and demurrage charges. They were paid by us and Lamborn & Company paid it back to us later. That is true of the storage and demurrage charges also."

[fol. 115] The plaintiff closed its testimony at this point. Defendant then presented J. E. YATES, who testified on direct examination by Mr. Watkins as follows:

"I live in Macon, Georgia, and I am in the wholesale grocery business and was in the wholesale grocery business in August and September, 1920. In my business I sold sugar, and have been selling sugar for about eighteen years, and am still engaged in the business."

Counsel for the defendant then asked the witness questions as follows:

Q. From your business of selling sugar in Macon in 1920, do you know what the market price of sugar sold by wholesale grocers was in September 1920?

To this question plaintiff's attorney, Mr. Park, objected as follows:

"I object to the testimony as to what sugar was sold for in Macon

by wholesale grocers. This question is a question of refiner's prices at the refinery and not what wholesalers may have sold for in another and entirely different market."

The Court then questioned the witness who stated that he was familiar with sugar sold by wholesale grocers to retailers and to chain stores and knew the market price of such sales in Macon in August, September, October, November, and December, 1920. In answer to questions from the Court the witness stated that in former times the wholesalers in Macon sold at from one-fourth to one-half a cent per pound above the price they paid the refiners, that from August to December, 1920, the market was in a very unsettled condition and normal differences could not always be obtained.

The witness said:

"After the market broke in August and September, I got the best [fol. 116] price *of* could regardless of cost."

With the testimony in this form the Court sustained the objection saying:

"I think it is the duty of the Court, unless there can be some connection, to tell the jury to reject it and if I am going to tell them that, then why admit it."

To the ruling of the Court in refusing to permit the witness to testify his opinion as to the reasonable market price of sugar in Macon, Georgia, in August, September, October, November and December 1920, the defendant then and there excepted, which exception was allowed, and here now excepts and the same is allowed and ordered sealed.

The same witness was then asked to state the sales made by him of sugar in September, 1920. The Court ruled that these sales were not admis-able and declined to permit the witness to testify; if permitted the witness would have testified that he made sales as follows:

"Beginning on September 1, 1920, a sale of 100 pounds of sugar at a price of 19¢ per pound and thereafter sales during the month of September at prices ranging from 20¢ to 15.75¢ per pound and in amounts as high as 1,000 pounds, the latter amount being sold on September 28th, at 15.75¢ per pound; the last sale in September was on the 30th and was of 100 pounds at 16¢ per pound."

[fol. 117] To the ruling of the Court in refusing to permit the witness J. E. Yates to testify to the sales shown in the foregoing statement defendant then and there excepted, which exception was allowed, and here now excepts which exceptions is allowed and ordered sealed.

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R. B. Small was then offered as a witness as to his opinion of the market value of sugar in Macon in August, September, October, November, and December, 1920, and the same ruling was made and the same exceptions had as to the witness J. E. Yates.

To the ruling of the Court in refusing to permit R. B. Small to

testify, as set out under the circumstances shown in the exceptions with reference to J. E. Yates, the defendant then and there excepted, and here now excepts, which exceptions are allowed and ordered sealed.

The witness R. B. Small was then asked to testify as to the sales made by him in September, 1920. Objection was made that the sales did not indicate market price and the court sustained the objection.

The witness, if permitted to testify, would have testified of sales as follows:

"Beginning on September 1st, 1920, a sale of 100 pounds of sugar at a price of 19¢ per pound and thereafter sales made during the month of September at prices ranging from 20¢ to 15½¢ per pound and in amounts as high as 2,030 pounds, the latter amount being sold on September 28th, at 15½¢ per pound; the last sale in September was on the 29th, being a sale of 100 pounds at a price of 16¢ per pound. The majority of sales were in lots of less than 300 pounds."

[fol. 118] To the ruling of the court in refusing to permit such a hearing of the statements showing the market value, the testimony of R. B. Small showing his sales in September, 1920, defendant then and there excepted, which exception was allowed, and here now excepts, which exception is allowed and ordered sealed, and this defendant assigns the ruling of the Court as error.

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W. E. Small was then offered as a witness, and was asked as to sales made by him of sugar in September and October, 1920. The witness testified that he was not personally in the sugar business; that he had bought some sugar and resold it, some to manufacturers, some to wholesalers, and some to retailers; that he sold it to whomsoever he could, at the best prices obtainable.

The witness testified that he made sales of sugar on the dates, to the parties, in the amounts, and at the prices stated on the statement reading:

| Date 1920 | Purchaser | Quantity | Price per lb. | Amount |
|---|---|---|---|---|
| Sept. 17. | Britt-Wirick, Atlanta, Ga..... | 500 sacks— 5,000# | 15½¢ | $7,750.00 |
| " 21. | " " " " ..... | 700 " 7,000# | 15½¢ | 10,850.00 |
| " 16. | " " " " ..... | 500 " 5,000# | 15½¢ | 7,750.00 |
| " 15. | Sears Sanitary Baker, Macon.. | 10 " 1,000# | 15½¢ | 167.50 |
| " 15. | Hammock-Rich Co., Coleman, Ga. | 10 " 1,000# | 16 ¢ | 160.00 |
| " 14. | C. D. Kenney, Macon, Georgia.. | 50 " 5,000# | 15½¢ | 775.00 |
| " 23. | Sears Sanitary Bakery, Macon.. | 10 " 1,000# | 15½¢ | 155.00 |
| " 23. | L. W. Rogers Co., Macon, Ga... | 100 " 10,000# | 15½¢ | 1,500.00 |
| " 23. | H. D. Adams Co., Macon..... | 50 " 5,000# | 15 ¢ | 750.00 |
| " 21. | " " " " " ..... | 100 " 10,000# | 15 ¢ | 1,500.00 |
| " 15. | Dempsey Hotel, " ..... | 10 " 1,000# | 15½¢ | 155.00 |
| " 17. | Melts Sanitary Bakery, Macon.. | 10 " 1,000# | 16 ¢ | 160.00 |
| July 2. | H. A. Kennington, Macon..... | 10 " 1,000# | 28 ¢ | 280.00 |
| Aug. 21. | Peeples M/g. & Sup. Co., Timonsville, S. C..... | 25 " 2,500# | 19 ¢ | 475.00 |
| Oct. 5. | Kingman & Everett, Macon..... | 30 " 3,500# | 14 ¢ | 420.00 |

Freight Rate, Macon to Atlanta, 28¢ per 100#.

[fol. 119] Upon objection being made to the testimony that it did not show market value applicable to this case, the Court ruled that only sales by refiners could be admitted, and sustained the objection to the testimony of W. E. Small. To the ruling of the Court in sustaining such objection, defendant then and there excepted, and here now excepts, which exception was then allowed and here now allowed and ordered sealed. The witness R. B. Small also offered to testify that he received two letters from Lamborn & Company, one dated April 23rd, and the other April 24th, 1920, that in the letter of April 23rd, it was stated that:

"The Savannah Sugar Refinery is still withdrawn from the market and will probably remain so for the next two or three weeks. During this time they can make no offerings at all either directly to the trade or through their brokers. When *do* do re-enter the market it will probably be necessary for them to allocate any available sugars to their customers, giving each regular customer his proper percentage. We know of course, that no customer will get the amount of sugar desired but we feel this is the only fair way the Refinery can distribute their sugars and give satisfaction to all."

and in the letter of April 24th that

"The Savannah Refinery is withdrawn from the market at the present time, having no sugars to offer either for immediate or deferred shipment. Should they have any sugars to offer in the near future, they will be allocated to their regular trade on a percentage basis. You may rest assured that our regular customers will receive their proper portion as our one aim will be to secure and equitable distribution."

The witness further testified, the jury being out at the time, that Mr. Ruan, broker for Lamborn & Company, told him that if he did not buy this sugar at the time he signed the contracts and signed the contracts, that he could-'t get any sugar from Lamborn. Witness says he might have bought sugar from others than Lamborn, but there was no sugar for immediate delivery offered, that because of the statement in the letter and of the statement of Lamborn's broker, the witness was influenced to order sugar for future delivery, which was not the usual custom of the plaintiff selling sugar in Macon; that prior to the war sugars were allotted by Lamborn & Company and other refiners without contracts.

The Court having heard the testimony of the witness Small while the jury was absent, ruled that the testimony was inadmissable, and sustained the objection thereto of plaintiff, to which ruling defendant then and there excepted, which exception was allowed, and defendant here and now renews the exception, which exceptions is allowed and sealed.

[fol. 120] H. R. ALEXANDER sworn for defendant:

Direct examination:

Mr. Saussy:

"I am a wholesale grocer in Savannah and was in 1920. I have a tabulation there showing at what prices I sold standard fine granu-
[fol. 121] lated sugar in September and October, 1920, in quantities from one hundred pounds up to 1,000 and 2,000 pounds. I have the records of each sale, the original charge slips. I had known Lamborn & Company in Savannah in 1920. Their business was brokers in the trade. I never dealt with them as refiners of sugar. They were not refiners of sugar in 1920. Their chief status in the city of Savannah up to that time was brokers. The Savannah Sugar Refinery was closed down in September, 1920,—withdrawn from the market. The relation of our wholesale prices to the refiner's prices was on a normal market one cent a pound. There was not a normal market existing on September 30, 1920.

"There were two refiners—two New York refiners—represented in Savannah by local brokers. Those brokers were not active. I have never heard of them making a sale for four or five years. A man in Savannah could not acquire this sugar that was offered in New York unless he went to New York and bought it and I doubt it then. The American Sugar Refining Company and the Savannah Sugar Refinery sold sugar in the Savannah market. I never in my business had any quotations from any other refiners in Savannah during 1920."

Mr. Watkins: We offer telegram from Lamborn & Company to A. B. Small Company dated Savannah, Ga. Sept. 9, 1920, reading:

"We insist you take up draft of Aug. 30th. Shipment went forward strict accordance contract terms and as instructed by you stop Demurrage accruing for your account. If absolutely impossible to finance, may have sellers accept thirty day note guaranteed by bank seven and half per cent interest plus stamps."

Mr. Watkins: We offer this trade circular that Mr. Lamborn referred to. This is a circular letter signed Lamborn & Company, addressed to the trade, dated Savannah, Georgia, October 12, 1920.

"If you are in need of sugar, kindly get in touch with us and secure
[fol. 122] our offerings from time to time. We can arrange for prompt shipment and are in a position to take especially good care of your needs."

Mr. Watkins: Here is another circular letter dated October 15th, signed Lamborn & Company, which just says:

"GENTLEMEN: Subject to confirmation the Savannah Sugar Refinery have to offer a limited quantity of sugar for prompt shipment on the basis of 11 cents per pound f. o. b. Savannah Refinery, Port Wentworth, Georgia, less 2%. These sugars are obtainable in barrels, 100 pound bulk bags, 4/25s, 10/10s and 20/5s. The raw market has maintained a steady tone despite the unsettled financial

conditions in Cuba. It is believed that the moratorium declared in Cuba will prevent forced sales of Cuban raw sugars. One of the most interesting features of the market is the re-entry of the American Sugar Refining Company as buyers of raw sugar, they having paid 7¢ cost and freight for twelve thousand bags of Cubas for prompt shipment, which price is the equivalent of about 8.01 duty paid New York. The Colonial, Henderson, and Godchaux Refineries of New Orleans have advanced from 11¢ to 12¢ per pound, and it is the consensus of opinion that the amount of sugar available at 11¢ is limited. The probabilities are that domestic sugars will follow very closely any movements of raws. Therefore, while the Cuban situation is critical, there are indications that sufficient support is developing to sustain the market at present level with the possibility of some recovery. The offerings of raw sugars are very light and it is believed that should the inquiry for refined sugar increase, refiners would buy raw sugars more freely. Another thing, it is believed that second hand sugars are being cleaned up fairly rapidly and stocks of sugars in the hands of the trade are considerably depleted, all of which contributes to help the situation just that much. If you are in need of sugar, please wire us your orders immediately, and we shall do our best to arrange for confirmation. Bear in mind that when in need of sugar it will be to your advantage to first get our quotations."

Mr. Watkins: Here is another letter dated October 20th. This is addressed to the trade and refers to the letter of October 15th.

"In our general letter to the trade dated October 15th, we offered for the account of the Savannah Sugar Refinery, subject to confirmation, standard fine granulated sugar, Dixie Crystals brand, for immediate shipment, on the basis of 11¢ per pound f. o. b. Savannah Refinery, Port Wentworth, Georgia, less 2% for cash. As indi- [fol. 123] cated in our letter of the above mentioned date, the sugar situation is more encouraging at the present time than it has been for a considerable period. There is evidence of a very substantial demand for refined sugar on the part of the trade, and the raw sugar market has firmed up considerably. For example, on October 8th sales of Cubas on the basis of 8¼¢ cost and freight. The American Sugar Refining Company has re-entered the market at 12¢; Henderson at New Orleans are withdrawn; Colonial of New Orleans are now 12¢; Howell of New York advanced yesterday to 12¢. The business which refiners have been receiving lately had resulted in slight oversales, and in some instances it is not possible to obtain immediate shipment. As the Savannah Sugar Refinery has done a considerable business in the past week on the basis of 11¢, it is possible that they may advance their price at any time. We know positively that their price will be advanced at the close of business on Saturday, October 23rd, to 12¢ per pound. If you are in need of sugar, it would be our suggestion that you wire us your order on the basis of 11¢ upon receipt of this letter. While we cannot guarantee confirmation of it on this basis, we shall do our best. Fairly prompt shipment can be made."

**Mr. Watkins: We offer this tabulation of prices:**

The following tabulation of prices for refined sugars was offered by Plaintiffs and admitted in evidence:

**EXHIBIT IN EVIDENCE**

Refined Sugar Prices July 1–Nov. 30

| | | Second hands | Federal | Arbuckle | Savannah | Warner | Howell | Pennsylvania | American | McCahan | Franklyn | Californian, Hawaiian | Henderson | Western | Revere |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| July | 1... | ..... | ..... | ..... | 21.00 | 24.00 | 22.00 | ..... | 22.50 | 21.00 | 22.50 | 22.75 | 23.00 | 22.75 | ..... |
| " | 2... | | | | | | | | | | | 22.25 | | | |
| " | 6... | | | | | | | | | | | | 22.50 | | |
| " | 8... | | | | ..... | | | | | | | | | | |
| " | 15... | | | | | ..... | 22.50 | | | | | | | | |
| " | 21... | | | 21.00 | | | | | | | | | | | |
| " | 29... | | | | 22.50 | | | | | | | | | | |
| Aug. | 2... | | | | | | 22.00 | | | | | 21.75 | | 21.75 | 22.50 |
| " | 4... | | | | | | | | | | | 20.00 | | 20.00 | |
| " | 10... | 18.50 | | | | | | | | | | | | | |
| " | 12... | 18.50 | | 17.10 | | | | | | | | | | | |
| " | 13... | 16.75 | | | | | | | | | | | | | |
| " | 19... | | | | | | | | | 18.50 | | | | | |
| " | 23... | | 17.00 | | | | 17.10 | | | | | | | | |
| " | 24... | 16.00 | | | | | | | ..... | | | | | | |
| " | 25... | 15.50 | | | | | | | | | | | | | |
| " | 26... | | | | | | | | | 17.00 | | | | | |
| " | 30... | | | | | | | | | | | | | | |
| " | 31... | 15.35 | 16.00 | 16.00 | | | | | | | | 17.00 | | 17.00 | ..... |
| Sep. | 1... | | | | | | | | | | ..... | | | | |
| " | 2... | 15.00 | 15.00 | 15.00 | | | | | | | | | | | |
| " | 3... | 14.75 | | | | | | | | | | | | | |
| " | 8... | | | | | | | | | 15.00 | | | | | |
| " | 9... | | | 17.10 | | | 15.00 | | | | | | 17.10 | | |
| " | 10... | 14.25 | | | | | | | | | | | | | |
| " | 13... | | | | | | | | | | | 15.00 | | 15.00 | |
| " | 14... | 14.75 | | | | | | | | | | | | | |

**Refined Sugar Prices July 1–Nov. 30—Continued**

| | | Second hands | Federal | Arbuckle | Savannah | Warner | Howell | Pennsylvania | American | McCahan | Franklyn | California, Hawaiian | Henderson | Western | Revere |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Sep. | 15... | | 14.75 | 14.50 | | | | | | | | | | | |
| " | 16... | 14.00 | 14.50 | | | | | | | | | | | | |
| " | 17... | 14.50 | | | | | 14.50 | | | | | | | | |
| " | 23... | 14.00 | 14.25 | 14.25 | | | | | | 14.50 | | | | | 15.00 |
| " | 27... | 13.60 | 14.00 | 14.00 | | | 14.00 | | | | | | | | |
| " | 29... | 13.50 | 13.50 | | | | | | | | | | | | |
| " | 30... | 13.00 | 13.00 | | | | | 13.00 | | | | | | | 14.00 |
| Oct. | 1... | 12.75 | | 13.00 | ..... | | | | | 12.50 | | | | | |
| " | 4... | 12.50 | 12.50 | | | | | | | | | | | | |
| " | 5... | 12.00 | 12.00 | | | | | 12.00 | | 12.00 | | | | | |
| " | 6... | 11.50 | 11.50 | 11.50 | | 11.50 | 11.50 | | | | | | | | |
| " | 7... | 11.00 | 11.00 | 11.00 | | 11.00 | 11.00 | 11.50 | | | | | 13.00 | | 11.00 |
| " | 14... | | | | | | | | | | | | 11.00 | | |
| " | 19... | 10.75 | ..... | | | ..... | 12.00 | | | | | | | | |
| " | 20... | | | ..... | | | ..... | ..... | 12.00 | | | 12.00 | | 12.00 | |
| " | 21... | | | | | 11.00 | 12.00 | 12.00 | 12.00 | 12.00 | | | | | |
| " | 25... | 11.50 | | | | | | | | | | | | | |
| " | 27... | | | | | | 11.00 | | | | | | | | |
| " | 29... | 11.00 | 11.00 | | | | | 11.00 | | 11.00 | | | | | |
| Nov. | 1... | | | 10.50 | | | | 11.50 | 11.00 | | 11.00 | | | | |
| " | 10... | 10.50 | 10.50 | | | 10.50 | 10.50 | 10.50 | 10.50 | 10.50 | 10.50 | | 10.50 | | |
| " | 11... | | 10.00 | | | | | | | | | | | | 10.50 |
| " | 12... | 10.25 | | | | | | | | | | | | | |
| " | 15... | 9.75 | 9.75 | | | 10.00 | 10.00 | 10.00 | 10.00 | 10.00 | | | 10.25 | | |
| " | 16... | 10.00 | | | | | | 9.50 | | 9.50 | | | 9.50 | | |
| " | 18... | | 9.50 | | 10.50 | 9.50 | 9.50 | | 9.50 | | 9.50 | | | | 9.50 |
| " | 19... | 9.00 | 9.00 | ..... | | | | | | | | | | | |
| " | 23... | | 8.75 | | 9.00 | 9.00 | 9.00 | 9.00 | 9.00 | 9.00 | 9.00 | | 9.00 | | 9.00 |
| " | 29... | | | 9.00 | | | | | | | | | | | |
| " | 30... | | | | | | | 8.75 | | | | | | | |

Blank space indicates no change. .... Indicates quotations withdrawn.
Colonial and Godchaux had no offerings during the entire period. Days in which no changes occurred have been omitted.

[fol. 124] IN UNITED STATES DISTRICT COURT

ORDER DIRECTING VERDICT FOR PLAINTIFF

Defendant having no further testimony which under the rulings of the Court was admissible, and plaintiff presenting no further testimony, the Court directed a verdict for the plaintiff in language as follows:

"Gentlemen of the jury, the court entertains the view under the rulings that he has made, which have resulted in excluding a large part of the evidence that was tendered by the defendant, that the only question that could possibly be submitted to the jury would be as to whether or not the sales made by Lamborn & Company of this sugar that was rejected were within a reasonable time, and under the ruling construing the contract and the rights and duties of the parties, it was held that there was no obligation to sell the sugar before the first of October. The sale was made, one-half on the 11th and one-half on the 16th of October. There was evidence on the part of the plaintiff, that of Mr. Ruan and Mr. Lamborn, as to the various efforts that were made to sell the sugar. It was shown that with this most unusual condition of the sugar market, and particularly with this plaintiff—there is no evidence so far as I recall that contradicts their testimony as to the facts of the diligence they exercised, or to show affirmatively or impliedly that what they did was not reasonable diligence under all the circumstances. While ordinarily that is a question for the jury, and ordinarily it is my pleasure to have the jury determine facts, but as counsel has invoked a ruling on my part with the view that if I would overrule a verdict holding that the sale was not within a reasonable time, it is my duty to direct a verdict. I entertain that view and so I will direct a verdict and one of you will sign a verdict for the amount represented by the difference between the contract price and the price obtained on resale."

[fol. 125] Mr. Watkins: Your honor will note our exceptions on the direction of a verdict and failure to submit the case to the jury.

To the charge of the court directing a verdict the defendant then and there, in open court and before the jury had retired, excepted, which exception was allowed, and which exception is here now repeated, allowed, approved, and sealed.

Thereafter on the 6th day of May, 1923, the jury in accordance with the instructions of the court found the verdict for the plaintiff, and judgment was entered thereon. On the 6th day of May, 1923, an order was entered extending the time sixty days to prepare, approve, and settle the bill of exceptions. Said October term, 1922, of said Court has not yet adjourned, and said sixty days has not run, and within said term and within the time of the order, and in furtherance of justice that right may be done, the defendant, The A. B. Small Company, presents the foregoing as its Bill of Excep-

| | | | |
|---|---|---|---|
| Lake City Grocery Co., Lake City, Fla. | 64 | 300 | 11 cts. Less 2% |
| Waynesboro Grocery Co.. Waynesboro, Ga. | .. | 620 | 11 cts. Less 2% |
| Cumberland Candy Co., Fayetteville, N. C. | 25 | 263 | 11 cts. Less 2% |
| A. Ehrlich & Bro. Gro. Co., Savannah, Ga. | 25 | 528 | 11 cts. Less 2% |
| Williamson's, Inc., Burlington, N. C. | 32 | 322 | 11 cts. Less 2% |
| F. D. Forester & Co., N. Wilkesboro, N. C. | 50 | 315 | 11 cts. Less 2% |
| Harrison Whsl. Gro. Co., Williamston, N. C. | .. | 700 | 11 cts. Less 2% |
| Toisnot Grocery Co., Elm City, N. C. | .. | 200 | 11 cts. Less 2% |
| La Grange Grocery Co., La Grange, Ga. | .. | 410 | 11 cts. Less 2% |
| | [700 | 9788]* | |
| Forest City Ice Cream Co. (Chat.) Savannah, Ga. | .. | 500 | 11 cts. Less 2% |
| Albemarle Grocery Co., Albemarle, N. C. | .. | 350 | 10¾ cts Less 2% |
| The Dade Grocery Co.. Miami, Fla. | .. | 240 | 11 cts. Less 2% |
| Millen Grocery Co., Millen, Ga. | .. | 500 | 11 cts. Less 2% |
| Newman Grocery Co., Newman, Ga. | .. | 410 | 11 cts. Less 2% |
| Phœnix Whse. Co., Fitzgerald, Ga. | .. | 240 | 11 cts. Less 2% |
| Waynesboro Grocery Co.. Waynesboro, Ga. | .. | 396 | 11 cts. Less 2% |
| Cumberland Candy Co., Fayetteville, N. C. | .. | 350 | 11 cts. Less 2% |
| J. W. Bell. Spartanburgg, S. C. | .. | 500 | 11 cts. Less 2% |
| Grace Whsl. Gro. & Feed Co., Gadsden, Ala. | 25 | 300 | 11 cts. Less 2% |
| Rowan Grocery Co., Salisbury, N. C. | 20 | 350 | 11 cts. Less 2% |
| Rowan Grocery Co., Salisbury, N. C. | 10 | 350 | 11 cts. Less 2% |
| | [755 | 14274]* | |

[*Figures enclosed in brackets in pencil in copy.]

| | | | | |
|---|---|---|---|---|
| ..... | Kenny, Charlotte, N. C. | Direct | " | 18th |
| ..... | Kenny, Chattanooga, Tenn | Direct | " | 18th |
| ..... | Kenny, Columbus, Ga | Direct | " | 18th |
| ..... | Kenny, Gadsden, Ala | Direc | " | 18th |
| ..... | Kenny, Asheville, N. C | Direct | " | 18th |
| ..... | Kenny, Montgomery, Ala | Direct | " | 18th |
| ..... | Kenny, Lexington, Ky | Direct | " | 18th |
| ..... | Shipp Grocery Co., Americus, Ga | Direct | " | 18th |
| ..... | Cone M. Maddox Co., Atlanta, Ga | Raley [(3495)]* | " | 18th |
| ..... | Ragon Brothers, Evansville, Ind | Direct | " | 19th |
| ..... | Lexington Gro. Co., Lexington, N. C | Direct | " | 19th |
| ..... | Tifton Grocery Co., Fitzgerald, Ga | Direct | " | 19th |
| ..... | Kenny, Atlanta, Ga | Direct | " | 19th |
| ..... | McDaniel & Company, Atlanta, Ga | Raley | " | 19th |
| ..... | Albany Coca-Cola Bot. Co., Albany, Ga | Direct | " | 19th |
| ..... | Bement-Seitz Co., Evansville, Ind | Direct | " | 19th |
| ..... | Sterne-Stevens Co., Anniston, Ala | Crutchfield | " | 19th |
| ..... | E. T. Sheftall & Co., Savannah, Ga | Direct | " | 19th |
| ..... | C. B. Ragland Co., Nashville, Tenn | Morgan | " | 19th |
| ..... | Henry King & Co., Murfreesboro, Tenn | Direct | " | 19th |
| ..... | Henry King & Co., Tullahoma, Tenn | Direct [(4833)]* | " | 19th |

tions in this case, and prays that same may be certified and allowed, signed and served as provided by law.

Fred T. Saussy, Savannah, Ga.; Mac Asbill, Horace Russell, Edgar Watkins, Watkins, Russell & Asbill, Atlanta Trust Building, Atlanta, Ga., Attorneys for The A. B. Small Company.

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[fol. 126] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions is correct in all respects and is hereby approved, allowed, and sealed, and made a part of the record herein in open court, this 4th day of May, 1923.

Wm. H. Barrett, U. S. Judge.

On the part of the plaintiff it is hereby agreed that the foregoing Bill of Exceptions is correct in all respects, presents that part of the testimony which is necessary to a clear understanding of the issues raised, and service of copy thereof is acknowledged, and said bill of exceptions may be approved, allowed, and settled this 4th day of May, 1923.

Orville A. Park, Attorneys for Plaintiff, Lamborn & Company.

[File endorsement omitted.]

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[fol. 127] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Filed May 5, 1923

This 4 day of April, 1923, comes the defendant by his attorney and files herein and presents to the Court his petition praying for the allowance of a Writ of Error and an Assignment of Errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the Writ of Error upon the execution of a bond by The A. B. Small Company, as Principal, and R. B. Small and W. E. Small, as Sureties, payable to Lamborn & Company in the sum of Twenty Thousand ($20,000.00) Dollars, such bond when approved to operate as a supersedeas.

This 4 day of April, 1923.

Wm. H. Barrett, Judge United States District Court, Southern District of Georgia.

[File endorsement omitted.]

[fol. 128] [Title omitted]

WRIT OF ERROR—Filed May 5, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judge of the United States District Court for the Southern District of Georgia, Western Division:

Because in the record and proceedings, as also in the rendition of the verdict and judgment between the A. B. Small Company, plaintiff in error, and Lamborn & Company, defendant in error, wherein the constitutionality of a law of the United States was drawn in question, and wherein it was contended that said law supported the pleadings of the plaintiff in error and relieved it of liability and the decision was against the rights especially set up and claimed under said law; manifest error hath happened to the great damage of the said A. B. Small Company as by its complaint appears. We being willing that error if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein *good*, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that [fol. 129] you have same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 4th day of May in the Year of our Lord One Thousand Nine Hundred and Twenty-three.

Lenoir M. Erwin, Clerk United States District Court, Southern District of Georgia, by Cecil Morgan, Deputy. (Seal of U. S. District Court, So. Dist. of Georgia, Western Division.)

Writ of Error granted this 4 day of May, 1923, and supersedeas bond fixed at $20,000.00.

Wm. H. Barrett, Judge United States District Court, Southern District of Georgia.

[File endorsement omitted.]

[fol. 130] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

[Title omitted]

PRÆCIPE FOR RECORD—Filed May 5, 1923

To the Clerk of said Court:

The A. B. Small Company, plaintiff in error, directs you to forward to the Supreme Court of the United States with the Writ of Error the parts of the record which it thinks necessary for the consideration of the errors assigned:

1. The original petition filed by Defendant in Error.

2. The Demurrer to the Petition filed by Plaintiff in Error.

3. Amendment of Petition by Defendant in Error filed May 14, 1921.

4. Amendment of Petition by Defendant in Error filed May 20, 1921.

5. Demurrer to Amended Petition.

6. Judgment of Court overruling Demurrers of Plaintiff in Error to original and amended Petition dated 5-9-21.

7. The Answer filed by Plaintiff in Error.

8. The Demurrer of Defendant in Error to Answer of Plaintiff in Error filed May 14, 1921.

9. Amendment to Answer filed by Plaintiff in Error allowed 2-20-22.

10. Amendment to Answer filed by Plaintiff in Error allowed 2-2-23.

11. Defendant in Error's demurrer to Amendment to Plaintiff in Error's Answer filed 2-25-22.

12. Judgment of Court sustaining demurrer of Defendant in Error to answer and amended answer dated 2-20-22.

13. Amended Judgment on Demurrers to Answer dated 2-21-22.

[fol. 131] 13. A. Exceptions Pendente Lite filed May 21, 1921 and Feb'y 21, 1922.

14. The Verdict and Judgment rendered herein.

15. Petition for Writ of Error.

16. Assignment of Errors.

17. Bond.

18. Bill of Exceptions.

19. Order Allowing Writ of Error.

20. Writ of Error.

21. Citation in Error and Acceptance of Service thereon.

22. This Designation of parts of the Record with Service thereon.

23. Clerk's Certificate.

This 21st day of April, 1923.

Mac Asbill, Horace Russell, Edgar Watkins, Attorneys for The A. B. Small Company, Plaintiff in Error.

Service and copy of the above and foregoing designation of the record, accepted, and all other or further notice or any service waived, and it is agreed that said designation states all the facts of the record that is necessary to a clear understanding of the Error complained of.

This 21st day of April, 1923.

Orville A. Park, Attorneys for Defendant in Error.

[File endorsement omitted.]

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[fol. 132] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, WESTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO FORWARD TRANSCRIPT—Filed May 25, 1923

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the United States Supreme Court, pursuant to the writ of error sued out, is extended until the fifth day of July, 1923. This May 24, 1923.

Wm. H. Barrett, Judge United States District Court.

[File endorsement omitted.]

[fol. 133] UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

CLERK'S CERTIFICATE

I, Lenoir M. Erwin, Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the foregoing contains a true and correct copy of the record, bill of exceptions, assignment of errors and all other proceedings in the cause lately pending in said Court, as the same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court at Macon, in said Division and District, this 9th day of June, A. D. 1923.

Lenoir M. Erwin, Clerk, by Cecil Morgan, Deputy. (Seal of U. S. District Court, So. Dist. of Georgia, West'n Div.)

Office Supreme Court, U. S.
FILED
APR 11 1924
WM. R. STANSBURY
CLERK

No. [redacted] 100

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1923.

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THE A. B. SMALL COMPANY,

Plaintiff in Error,

vs.

LAMBORN & COMPANY,

Defendant in Error.

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## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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By

FREDERICK T. SAUSSY,
Savannah, Ga.

EDGAR WATKINS,

MAC ASBILL,

HORACE RUSSELL,
Atlanta, Georgia.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1923.

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**THE A. B. SMALL COMPANY,**
**Plaintiff in Error,**

**vs.**

**LAMBORN & COMPANY,**
**Defendant in Error.**

---

## PRELIMINARY. JURISDICTION.

The A. B. Small Company, plaintiff in error here, defendant below, filed its answer setting up as a defense certain provisions of the Lever Act and the Regulations of the Food Administration based thereon. Lamborn & Company, a copartnership, defendant in error here, plaintiff below, demurred to these paragraphs of the answer on the ground that the Lever Act was unconstitutional and void, which demurrer was sustained and the pleas stricken. The rulings on the demurrer presenting an issue as to the constitutionality of a law of the United States, which issue had never theretofore been decided by this court, this writ of error was under authority of Section 238 of the Judicial Code taken direct from the United States District Court to this Court.

## PART ONE.

### General Statement of the Case.

**(A) The Petition.**

Lamborn & Company, hereinafter called the "Seller" filed its complaint, and subsequent amendments, in the United States District Court for the Southern District of Georgia,

Western Division, alleging the sale under written contracts of certain sugar to the A. B. Small Company, hereinafter called the "Buyer", that the Buyer refused to accept and pay for such sugar and that the Seller had been damaged thereby.

**(B) Demurrers.**

General demurrers to the original and amended complaint were filed on behalf of the Buyer presenting the contentions that the alleged contracts, copies of which were attached to the complaint, were unilateral, lacking in mutuality, and created no obligation on either the Buyer or the Seller. These demurrers were overruled and exception taken.

**(C) Answer.**

An answer and amendments thereto, were filed which denied the making of any valid contract between the parties for the sugar involved in the suit, set up defenses under the Lever Food Control Act and the Regulations of the Food Administration based thereon and claimed that plaintiff was guilty of violations of the Anti-Trust Acts which invalidated the claimed contracts.

**(D) Demurrers to Answer.**

The Seller demurred generally to the answer and demurred to those paragraphs of the answer and amended answer setting up defenses under the Lever Act, Regulations of the Food administration, and the Anti-Trust Acts on the ground that the Lever Act was unconstitutional and void and that the violations of the Anti-Trust Acts alleged set up no defense, all of which demurrers were sustained and the pleas stricken.

**(E) Trial, Verdict and Judgment.**

At the trial the Court directed a verdict for the Seller

upon which judgment was entered. (record 55.) The Court having held in sustaining the Seller's demurrer to the Buyer's amended answer that the pleas based upon the Lever Act should be stricken because said Act was unconstitutional and void, this writ of error was taken direct from the District Court to this Court.

**(F) Facts Established.**

Both the Buyer and Seller executed the alleged contracts attached to the complaint as Exhibits "A" and "B". (record 9, 10).

Shipment was made to the Buyer in accordance with the contracts during the latter part of August, 1920, and the sugar was refused by the Buyer early in September, and stored by the Seller on September 22, 1920. The Buyer having advised the Seller that no sugar would be received under the contracts no further shipments were made. On October 11th and November 3rd (record 76) the sugar was sold for the account of the Buyer after notice.

**(G) Assigned Errors Logically Grouped.**

The assigned errors fall into four groups, as follows:

1. Constitutional questions arising from the ruling of the Court striking certain pleas and holding that the Lever Act and the Regulations of the Food Administration thereunder, upon which the pleas were based, were void because in violation of the Constitution of the United States.

2. Error arising from the striking of pleas setting up violations of the Anti-Trust Acts as a defense.

3. Those claiming that the purported contracts were invalid because unilateral and lacking in mutuality.

4. Errors respecting evidence and in directing a verdict.

## PART TWO.

### First Group of Errors—Constitutionality of Lever Act.

**Section 1. Statement of This Part of the Case.**

(a) Pleadings.

In paragraphs (A) through (M) of its amended answer (record 41-47) defendant pleaded the rules of the United States Food Administration, their violation, and the regulations of the President in administering the Lever Act which regulations limited the Seller to one cent a pound profit upon the sugar involved herein. Other violations of this Act were also pleaded.

Plaintiff demurred to these pleas (record 49-52) and its demurrer was sustained (record 53, 54).

**Section 2. Assignment of Errors—Group One.**

The specific assigned errors in this group (record 56) are as follows:

1. Because the court erred in its ruling on the demurrer of the plaintiff to the answer of this defendant in sustaining the said demurrer and in holding that the Act of Congress approved August 10, 1917, known as the Lever Act, is unconstitutional, null and void, because in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.

2. Because the court erred in striking those parts of this defendant's answer wherein defendant pleaded and relied upon the Act of Congress of August 10, 1917,

chapter 53, page 276, which Act defendant pleaded as a valid, constitutional statute of the United States, and which Act was contended by plaintiff in the demurrer to defendant's answer to be unconstitutional, null and void, in violation of and repugnant to the fifth and sixth Amendments to the Constitution of the United States.

**Section 3. Argument and Authorities.**

The Congress on August 10, 1917, Chapter 53, enacted a statute entitled:

> An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel. (40 Stat. C. 53, page 276.)

Section 5 of this Act, so far as it is here material, authorized the President when he

> shall find it essential, to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act.

This section further provided:

> . . . . The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or willfully fails or refuses to discontinue

> any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall upon conviction thereof, be punished by a fine not exceeding $5,000.00, or by imprisonment for not more than two years or both. . . . .

In administering section 5 of the above Act, the President determined and published his finding that one cent per pound above cost would be the reasonable profit allowed on sales of sugar. Any sales at a higher price than could be had by adding one cent to the cost of the sugar were unreasonable and illegal in violation of the Act and the regulation of the President based thereupon. Other regulations were issued by the Food Administration to whom the President delegated authority to administer the Lever Act.

Defendant in error was a licensee under the United States Food Administration, although the license was probably not inclusive of the particular sales here shown, and by accepting such license undertook to transact its business in accordance with the Lever Act and the regulations made by the President thereunder.

In Addy Co. v. United States, decided February 25th, 1924, since this appeal was taken, 264 U. S. ——, this court as we understand the decision recognized the validity of the Lever Act and of the President's regulations thereunder when such Act and regulations "applied only to transactions thereafter begun". In the instant case the transactions here involved began after the passage of the Lever Act, the announcements of the President's regulations and the acceptance by the defendant in error of a license under such Act and regulations.

The fact that this court in United States v. Cohen, 255

U. S. 81, held the Lever Act to be void as a criminal statute does not as said by this court in Levy Leasing Co. v. Siegel, 258 U. S. 242, make invalid the statute as a civil regulation.

In Henrikson vs. Pacific Coast Packing Co., 187 Pac. Rep. 377, the Court refused to enforce the contract price agreed to be paid for fish, as the price was higher than fixed by the Food Administration, saying at page 379:

> "If the respondent can recover under the guaranty clause in the contract, more than the price fixed by the Federal Food Administration, the law under which such prices were so fixed would be nullified . . . . If the act could be avoided by contracts such as the one here in question, its provisions would be largely defeated. . . . While the Food Administration Act remains in force and effect, its provisions must be held controlling, and that contracts in violation thereof are unenforceable."

In Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489, the first headnote reads:

> "Where during the war, in violation of Lever Act, sec. 25 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, sec. 3115-1 8q) a purchaser paid in excess of contract price for coal received, the seller and buyer were in pari delicto, and the purchaser could not recover overpayment made."

Other decisions holding the Lever Act to be valid are:

> Ayulo v. Mollen, Thompson James Co., 283 Fed. 863;
> Morris Adler & Co. v. Jones & Co., 94 So. (Ala.) 816;
> Segal v. Chemical Importing & Mfg. Co., 199 N. Y. S. 250;
> Neil v. Utah W. Gro. Co., 210 Pac. 201.

The Lever Act being valid, a contract in contravention thereof is void.

Harris v. Runnels, 12 How. 79, 13 L. Ed. 901;
Miller v. Ammon, 145 U. S. 421, 36 L. Ed. 759;
Burck v. Taylor, 152 U. S. 634, 38 L. Ed. 578;
Waskey v. Hammer, 223 U. S. 85, 56 L. Ed. 359.

Bearing in mind that the Lever Act was enacted "to provide further for the national security and defense by . . . . conserving the supply, and controlling the distribution of food products . . . ." it would seem clear that a contract made in violation of its provisions or in violation of any regulation of the President or Food Administration made under authority of the Act would be illegal and unenforceable. Such being the law, the pleas setting up as a defense violations of the Lever Act and of the regulations of the President and the rulings of the Food Administration under the Act should not have been stricken and the Court erred in so doing.

Were we wrong in our contention that the Lever Act makes void the contracts sued on here, certainly the regulations would limit the right of recovery prima facie to the profit fixed by the President, leaving to a jury the question of whether or not such fixed profit was reasonable.

## PART THREE.

### Second Group of Errors—Violation of Anti-Trust Acts.

**Section 1. Statement of This Part of the Case.**

(a) Pleadings.

In paragraph 29 (record 28), paragraph 30 (record 29, 30) and paragraph 29 (record 35-37) defendant pleaded violations of the Anti-Trust and other Acts.

Plaintiff demurred to these pleas (record 38, 39, 40, 41),

the demurrers were sustained (record 53, 54), the pleas were stricken, and exceptions taken (record 54).

**Section 2. Assignment of Errors—Group Two.**

The specific assigned errors in this group (record 56, 57) are as follows:

> 3. Because the Court erred in sustaining plaintiff's demurrer to defendant's plea setting up the Anti-Trust laws of the United States as a defense and in striking such defense.
>
> 4. Because the Court erred in striking the pleas of defendant and in sustaining plaintiff's demurrers thereto, such pleas being based on the Anti-Trust laws and the pleas in detail showing that the plaintiff in this case in conspiracy with others combined to raise the prices of sugar sold in interstate commerce, that such prices were increased to an exorbitant sum, future contracts enacted, and that to enforce the contract sued on would be to make effective an essential part of such illegal scheme.

**Section 3. Argument and Authorities.**

The pleadings alleging violations of the Anti-Trust Acts were almost identical with the pleadings found in the case of Continental Wall Paper Co. v. Voight & Sons, 212 U. S. 227, 53 L. Ed. 486, and set up facts sufficient to invalidate the contracts.

The Supreme Court in Wilder Manufacturing Co. vs. Corn Products Refining Co., 236 U. S. 165, 59 L. Ed. 520, distinguished the Wall Paper case. The question for this court is, does the Wall Paper case or does the Wilder Manufacturing case apply? In the Wall Paper case the prior case of Connolly vs. Union Sewer Pipe Co. was discussed, and the distinction between the two cases fully set out. In the Con-

nolly case and in the Wilder Manufacturing Co. case, the defense in substance was that the Seller was an illegal corporation. Those cases sought to outlaw the Seller and make void any contract which he might make.

The Wall Paper case and the instant case are cases wherein to enforce a contract sued on would be to make effectual the conspiracies in violation of the law. The sales in the Connolly case and the Wilder Mfg. Co. case were no part of the illegal organization. The sales in the Wall Paper case and in the instant case were necessary parts of the conspiracy. In the Wall Paper case and in this case the Seller sought and is seeking to realize the fruits of his illegal acts. In the Connolly case and Wilder Mfg. Co. case the fruits of the combination had been received aside from, prior to and independent of the contracts there involved.

A stronger case here exists than in the Wall Paper case. In the Wall Paper case the Court points out that the rule gives something without requiring payment therefor. In this case the undelivered part of contracts is wholly executory and the defendant has received nothing. All it asks is that the plaintiff be denied the fruits of its executory illegal contract, and that the court do not lend its aid to a party guilty of a violation of the law when the aid sought makes that violation effective.

The pleadings set up violations of the Anti-Trust Acts as definitely as the facts allowed and as the law required.

> Swift & Co. v. United States, 196 U. S. 375, at pages 395 and 396.

The pleas expressly set forth a conspiracy to violate the Lever Act and as that Act affords no remedy, as does the Anti-Trust Act, it could not be held that the remedies of the Act itself are exclusive, as none are furnished therein.

## PART FOUR.

### Third Group of Errors—The Contracts Were Unilateral.

**Section 1. Statement of This Part of the Case.**

(a) Terms of contracts.

In one contract a clause provided:

> "Shipments to be made sometime during the period between July 15 and October 1, 1920; but shipping is to be at seller's option, subject to delay if any."

In the other contract the corresponding clause provided:

> "Delivery of equal quantities monthly beginning the last half of July and continuing through August and September of 1920 if possible. Seller's option of shipping to suit seller's convenience during period mentioned, subject to delay if any."

Both contracts contained the provisions:

> "Terms and withdrawals subject to the approval of the seller's credit department", and
>
> "Sellers will not be responsible under this contract if shipment is prevented or delayed by war conditions, strikes, labor difficulties, accidents, embargoes, regulations or restrictions imposed by any Government or Governmental agencies, fire or any other cause beyond the sellers' control, or if the supply of raw material of the refinery manufacturing the sugar described in this agreement shall be interrupted by any such cause."

(b) Assignment of errors—group three.

The specific assigned errors in this group (record 57) are as follows:

5. Because the Court erred in not sustaining the demurrer to the second count of the declaration of plaintiff, the said count with the alleged contracts attached thereto failing to state a cause of action against the defendant.

6. Because the Court erred in not sustaining the demurrer to all the counts of the declaration of the plaintiff, said counts and the contracts attached thereto and made part thereof showing that the alleged contracts were void because not constituting any such mutual obligations as would make them valid.

7. Because the Court erred in not sustaining the demurrer to all the counts of plaintiff's declaration and in not dismissing the cause, for the reason that the declaration sued on, with the exhibits thereto attached, showed that the plaintiff was not bound to deliver, in that each of the alleged contracts contained a provision that "terms and withdrawals subject to the approval of seller's credit department"; such provisions giving the seller the right at its option to approve or disapprove any and all withdrawals and such provisions depriving the alleged contracts of mutuality and consideration and making the alleged contracts null and void.

8. Because the Court erred in not sustaining the demurrer of defendant to all the counts of the declaration sued on herein and erred in not dismissing this cause, it appearing from said declaration and the exhibits thereto attached that no obligation to deliver existed under either of said alleged contracts if the "refiner manufacturing sugar should be interrupted because of any of the conditions" named in said alleged contracts, such provisions depriving the alleged contracts, of mutuality and making them uncertain and indefinite and not binding on the defendant.

**Section 2. Argument and Authorities.**

The clause, "Terms and withdrawals subject to the approval of seller's credit department" appearing in both alleged contracts and the evidence not showing that the credit department ever approved in writing and notified defendant of said terms and withdrawals, no contract was entered into between the parties.

Howell v. Maine, 127 Ga. 574;
City of Pocatello v. Fidelity, etc., Co., 267 Fed. 181.

From an observation of all the provisions of the alleged contracts it appears that no substantial and binding promises were made by the Seller to the Buyer and further that the alleged contracts were indefinite, illusory and so limited by exceptions as not to constitute any valid consideration for the promises of the Buyer.

In considering a contract similar to those involved in this case the Iowa court held that the conditions to relieve the Seller, among which were accidents, causes beyond control of the manufacturer, whether occurring in their plant or that of any concern from whom they purchased parts, shipments subject to prior orders and as business would permit, etc.

> "made performance on the seller's part subject to so many exceptions and contingencies as to deprive their promise of any practical and enforceable quality"

and therefore the agreement lacked mutuality and was not enforceable.

Nicholl v. Wetmore, 156 N. W. 319.

## PART FIVE.

### Fourth Group of Errors—Relating to the Trial.

**Section 1. Statement of This Part of the Case.**

The trial court directed a verdict for the Seller represented by the difference between the contract price and the price obtained on resales of the sugar on October 11 and 16th, 1920, (record 85), although no resale was made on October 16th (record 76). The evidence showed that part of the sugar was refused by the Buyer early in September and stored by the Seller on September 22nd, that part of the sugar was never shipped to the Buyer, and that resales of the sugar were made on October 11th and November 3rd, 1920, (record 76) and that the market value of sugar was much greater during September than in October and greater in October than in November.

The trial court refused to permit witnesses for the Buyer to testify to the market value, or to actual sales of sugar made by them, in Macon, Georgia, during the months of September, October and November, 1920, which evidence tended to show that the Seller did not exercise due diligence in making the resales.

**Section 2. Assignment of Errors—Group Four.**

The specific assigned errors in this group (record 57, 58) are as follows:

> 9. Because the Court erred in not permitting the witness J. E. Yates, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said date he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to one thousand pounds

at prices September 1st, 1920, of nineteen cents per pound gradually decreasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objections sustained by the trial court.

10. Because the Court erred in not permitting the witness R. B. Small, a wholesale grocer of Macon, Georgia, to testify to his sales beginning September 1st, 1920, and continuing to September 30, 1920, and to testify that between said dates he sold sugar to retail grocers in and around Macon, Georgia, in quantities ranging from one hundred pounds to two thousand and thirty pounds, at price September 1st, 1920, of nineteen cents per pound, gradually decreasing from that date to September 30, 1920, when the price was sixteen cents per pound, said testimony having been offered, objected to, and the objection sustained by the trial court.

11. Because the Court erred in not permitting the witness W. E. Small to testify as indicating market value and as affecting the question of the legality of the resales pleaded to sales of sugars and quotations equal to and greater and at prices higher than was obtained about the same time by plaintiff in making its resales.

12. Because the Court erred in not permitting the witnesses, R. B. Small and J. E. Yates, wholesale grocers in Macon, Georgia, to testify as to prices obtained by them from sales of sugar to retail merchants and chain stores for the months of September, October and November, 1920.

13. Because the Court erred in directing a verdict for the plaintiff on the resale count of its petition, there being evidence sufficient to demand a submission of the question of the validity of such resale to the

jury and to support a finding of the jury that such resale was not fairly made in a reasonable time.

**Section 3. Summary of Fourth Group of Errors.**

The errors shown in this division of the assignment of errors present specific errors as follows:

1. In removing from the consideration of the jury the determination of the question as to whether the resales made on October 11th and November 3rd were within a reasonable time after the buyer refused to accept the sugar and after the sugar was deliverable under the contracts.

2. In not permitting evidence to be introduced to show that neither due diligence nor proper prudence was exercised in reselling the sugar.

**Section 4. Argument and Authorities.**

Under the contracts sued upon deliveries were to be made between July and October 1st. Actual deliveries were tendered during September and the Buyer refused to accept the sugar. Thereafter if the Seller chose to resell the sugar for the Buyer's account the duty rested upon it to make the resale within a reasonable time after the refusal in September and certainly within a reasonable time after September 30th, the Seller having wired the Buyer on September 27, 1920,

> "Failure by you to furnish assortments and to order out your sugar by wire or mail within next forty-eight hours will force us to treat contracts as broken by you and will compel us to sell your sugar for your account and at your risk." (record 64.)

LaGrange Grocery Co. v. Lamborn & Co., 283 Fed. 869, at 871 (1).

Whether resales made on October 11th and November 3rd were within a reasonable time after September 30th, or earlier in September, was a question for the jury to determine and the court improperly withheld the question from the consideration of the jury.

In directing a verdict the court stated that the resales were made upon October 11 and 16th, 1920, (record 85). The evidence shows that one of the resales was upon November 3, 1920,—and not upon October 16, 1920. Such ruling of the court was erroneous and prejudicial to plaintiff in error. Certainly a jury must determine whether the defendant in error waited an unreasonable time between its telegram of September 27, 1920, and the last resale on November 3, 1920. The record shows that not even the judge considered whether the resale on November 3rd was within a reasonable time.

To assist the jury in determining whether the resales were diligently and prudently made evidence was offered as to the market value of the sugar in Macon during September, October and November, 1920, and this evidence showed actual sales made throughout the period at higher prices than the Seller obtained on resales. Such evidence was excluded erroneously and a verdict directed in favor of the Seller based upon the differences between the contract price and the price obtained on resale.

The resales were attempted under the Georgia Code, section 4131; it has always been held by the Georgia courts that whether the resale was made within a reasonable time and under such circumstances as to be binding on the Buyer as a measure of damages should be submitted to the jury. The court would not permit the evidence offered to be submitted to the jury, and also withdrew all questions of reas-

onable time and other circumstances from the jury and directed a verdict.

Brooke v. Robson, 3 Ga. Ap. 136;

Bennett v. Mann, 24 Ga. Ap. 581 (2);

Robson & Evans v. Hale & Sons, 139 Ga. 753, at 755;

Robson & Evans v. Weil, 142 Ga. 429, at 431 (5).

Respectfully submitted,

FREDERICK T. SAUSSY,
Savannah, Ga.,

EDGAR WATKINS,
MAC ASBILL,
HORACE RUSSELL,
Atlanta, Georgia,

Attorneys for Plaintiff in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 399

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THE A. B. SMALL COMPANY,
Plaintiff in Error

v.

LAMBORN & COMPANY.
Defendant in Error

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In Error to the District Court of the United States for the Southern District of Georgia

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# BRIEF FOR DEFENDANT IN ERROR.

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## STATEMENT OF THE CASE

This is another of the many sugar cases which since the summer of 1920 the Courts of the country have been called upon to decide—due to the repudiation of their contracts by buyers of sugar.

In April and May, 1920, while the price of sugar was very high, The A. B. Small Company, a wholesale grocer of Macon, Georgia, purchased from Lamborn & Company through their Savannah, Georgia, office, 450 barrels of sugar at 25½ cents per pound "f. o. b. Savannah Refinery, Port Wentworth, Georgia".

Shipments were to be made from July 15th to October 1st. The contracts were reduced to writing and were formally accepted by both buyer and seller. The Savannah Office of Lamborn & Company acted as brokers in negotiating the contract, which was accepted by Lamborn & Company, New York, N. Y., as the sellers. (Transcript pp. 9-11.)

Except as to dates, quantities, and time of delivery the two contracts were indentical. For convenience of reference, the first contract dated April 30, 1920, is set out in full:

"Contract No. 672.

New York, N. Y., April 30, 1920.

Sold by Lamborn & Company, New York, for the Account of Whom It May Concern

Sold to A. B. Small Co., Macon, Ga., 150 barrels Standard Fine Granulated Sugar, on the basis of 25.50 cents per pound f. o. b. Savannah Refinery, Port Wentworth, Ga., for Fine Granulated 'Shipments to be made some time during the period between July 15th and October 1, 1920; but shipping is to be at sellers' option,' subject to delay, if any.

Terms: Cash before delivery less 2%, or cash in seven days less 2%. Terms and withdrawals subject to the approval of the sellers' Credit Department.

Sellers to furnish sugars packed in barrels or bags, but sellers have option of shipping no more than 50% of contract in 100-lb. bags. Sellers will furnish 2, 5, 10 and 25 lb. bags at the ruling differential above Fine Granulated basis, if desired by the trade, provided these packages are obtainable, but do not guarantee to furnish said packages.

Sellers will not be responsible under this contract if shipment is prevented or delayed by war

conditions, strikes, labor difficulties, accidents, embargoes, regulations or restrictions imposed by any Government or Governmental agencies, fire or any other cause beyond the sellers' control, or if the supply of raw material of the refinery manufacturing the sugar described in this agreement shall be interrupted by any such cause.

Option of routing is reserved by sellers. Delivery will be considered complete on receipt of goods by carrier.

This purchase to be invoiced and paid for at contract price. No allowances whatever for declines in market. If shipment is made freight prepaid, the ruling prepaid freight basis to destination in effect on date of shipment will govern. Assortments against contract must be furnished when called for by sellers. All additional import duties, excise or other taxes hereafter levied on the Raw or Refined Sugar necessary to fill this contract at buyer's expense in addition to price specified.

Kindly sign and return one copy confirming purchase.

Lamborn & Company, Savannah, Ga., Brokers.
This contract is accepted: Buyer—
Signed: A. B. Small Co.
This contract is accepted: Seller—
Lamborn & Company, New York, N. Y.,
Signed by G. G. Bond."

(Transcript pp. 9, 10.)

The second contract executed on May 7, 1920, was for 300 barrels and contained this clause with reference to delivery: "delivery of equal quantities monthly beginning the last half of July and continuing through August and September of 1920, if possible. Sellers' option of shipping to suit sellers' convenience during the period mentioned, subject to delay, if any."

(Transcript p. 10.)

A portion of the sugar covered by each contract was shipped, accepted and paid for by the buyer. The second installment was also shipped but the buyer repudiated the contracts, denied liability thereunder and refused to take the sugar. At its suggestion the sugar was stored at the point of delivery "for the account of whom it may concern." The buyer refused to order out the third installment. At the time of the shipment of the second installment the sugar market was steadily declining and at that time the market price was already considerably below the contract price. The market continued to decline steadily and rapidly.

(Petition and answer. Transcript pp. 3 and 26.)

On September 27th, shortly before the delivery period expired, the sellers called on the buyer to furnish assortments and shipping directions within forty-eight hours, advising that on failure to do so they would treat the contracts as breached and would sell the sugar for the buyer's account and hold it for the difference between the contract price and the amount realized on the resale. (Transcript p. 64.) The buyer continuing to repudiate the contracts, the sugar was sold for its account and this suit was brought to recover the damages sustained through the breach of the contracts.

The complaint was in two counts which were identical save as to the admeasurement of the damages. In the first, recovery was sought for the difference between the contract price and the price obtained on resale; in the second, for the difference between the contract price and the market price at the time and place of delivery.

The Defendant, by demurrer, attacked the validity of the contracts as being unilateral and not mutually binding. This was overruled. Certain special demurrers calling for additional particulars, were met by amendment to the petition and were also overruled.

The Defendant's answer admitted the execution of the contracts, that a portion of the sugar sold had been delivered under each of them, and that the contracts had been repudiated. As a defense it was alleged in the answer that the contracts were unilateral and not binding for that reason. The Defendant also pleaded as a special defense that the Plaintiffs and others combined and conspired in violation of the Anti-Trust Acts of Congress for the purpose of restricting interstate trade and competition in the sale of sugar. By an amendment to the answer the Defendant also set up that the sales were in violation of the Food Control, or Lever Act of Congress. On demurrer the paragraphs of the answer alleging that the contracts were not mutually binding and all the affirmative defenses were stricken by the Court for insufficiency and as constituting no defense to the action.

Upon the trial the contracts and the breach thereof being admitted, the resales with resulting damages were proved. Defendant offered certain testimony, which it claimed tended to establish that the market price was greater than that received by the Plaintiffs on the resale. This evidence the Court refused to admit.

(Transcript pp. 77-80.)

The Plaintiffs having proved their case as laid and there being no evidence to the contrary, the Court directed a verdict for the Plaintiffs for the amount

claimed in the first count, in which the damages were measured at the difference between the contract price and the amount realized on the sale of the sugar for the Defendant's account. (Transcript p. 85.)

This writ of error challenges the correctness of these rulings.

## ASSIGNMENTS OF ERROR

The fourteen assignments of error may be divided into five groups:

(1) That the contracts declared on were without mutuality of obligation and were therefore unenforceable.
Assignments 5, 6, 7 and 8, (Transcript p. 57).

(2) That the plea setting up violations of the Anti-Trust Act was improperly stricken.
Assignments 3 and 4 (Transcript p. 56).

(3) That the amended answer setting up alleged violations of the Lever Act and the regulations of the Food Administration were improperly stricken.
Assignments 1 and 2 (Transcript p. 56).

(4) That certain evidence offered by Defendant was improperly excluded.
Assignments 9, 10, 11 and 12 (Transcript p. 58).

(5) That the case should have been submitted to the jury and it was error to direct a verdict for the Plaintiffs.
Assignment 13 (Transcript p. 58).

## BRIEF OF THE ARGUMENT

### I.

### MUTUALITY OF THE CONTRACT

Defendant demurred to the petition upon the ground that the contracts upon which suit was entered were not mutually binding upon the parties, or in the vernacular of the profession in Georgia, were unilateral. The same contention was made in the answer. The Court overruled the demurrer to the petition and sustained Plaintiffs' demurrer to the answer, striking the paragraphs thereof which set up this defense.

The clauses in the contract which are relied upon by the Defendant were as follows:

> "Terms and withdrawals subject to the approval of the sellers' credit department."

And

> "Seller will not be responsible under this contract if shipment is prevented or delayed by war conditions, strikes, labor difficulties, accidents, embargoes, regulations or restrictions imposed by any Government or Governmental agencies, fire or any other cause beyond the sellers' control, or if the supply of raw material of the refinery manufacturing the sugar described in this agreement shall be interrupted by any such cause."

Contract (Transcript p. 9); Answer (Transcript p. 25); Demurrer (Transcript p.p. 16, 17).

The contracts purport to be completed sales for the delivery of a specific quantity of sugar at a definite price and are signed by both parties. Under the first contract

"Shipments (were), to be made sometime during the period between July 15 and Oct. 1, 1920, but shipping is to be at sellers' option, subject to delay, if any."

(Transcript p. 9.)

Under the second contract

"Delivery (was to be), of equal quantities, monthly beginning the last half of July and continuing through August and September of 1920, if possible; sellers' option of shipping to suit sellers' convenience during the period mentioned, subject to delay, if any."

(Transcript p. 10.)

Both contracts contained the clause

"Terms—Cash before delivery, less 2%, or cash in seven days, less 2%."

(Transcript pp. 9, 10.)

Under both contracts, the purchaser was to furnish assortments against the contract when called for by sellers.

It is contended that the clause, "terms and withdrawals subject to the approval of the sellers' credit department" make it optional with the Plaintiffs whether the contract would be complied with or not, for it is said the sellers' credit department might not approve the terms, or agree for the sugar to be withdrawn.

The terms, as stated in the contract, were either "cash before delivery less 2%, or cash in seven days less 2%." The seller was given the right to elect, when shipment was to be made, as between the two alternative terms of payment. The sellers could not arbitrarily refuse to fix one or the other of these terms

for the contract of sale was complete. The sellers could have declined to ship unless cash was paid in advance, i. e., before delivery, or if they choose to do so, the sugar could be shipped without demanding cash, in which event, the buyer would be expected to pay in seven days; the cash discount of 2% being allowed in either event.

A similar option, though generally given to the buyer rather than the seller, is not only usual but well nigh universal. "Terms cash, less 2% in thirty days" gives the buyer the option of paying within 30 days at a discount, or paying the full face of the invoice after the discount period. Such an option does not destroy the mutuality of the contract of sale.

The Circuit Court of Appeals of the Third Circuit had occasion to construe a contract of sale containing this provision:

> "Terms strictly 2% cash, 10 days from date of invoice, or 30 days net, f. o. b. * * * * Application of these terms subject to the approval of our credit department."

The Court held that this did not mean that the terms of payment were subject to the approval of the sellers' credit department at will during the life of the contract, but meant a right to be exercised only before the sellers performed by making deliveries. When so exercised, the credit was fixed and became an established term of the contract.

**McLain-Hadden-Simpers Co. v. Trent Rubber Co. (C. C. A. 3rd Cir.), 275 Fed. 831.**

"Withdrawals" of sugar were also subject to the approval of sellers' credit department. It is contended that this meant that "delivery" of the sugar was

optional and that the sellers could refuse to deliver without breaching the contract. The term "withdrawals" in commercial contracts for future delivery is of very general use. It indicates the amount or quantity which may be ordered out by a buyer at any one time and removed from the entire lot or amount contracted for. These contracts were for the sale of a comparatively large quantity of sugar for future delivery; the buyer having the right from time to time to "withdraw", or order out, specific quantities within the contract period of delivery. Such "withdrawals" were to be subject to the approval of the sellers' credit department. The expression, reasonably construed as it is commonly used in the commercial world, does not mean that the sellers could refuse to make delivery within the time provided in the contract. The term "withdrawal" is not synonymous with "delivery". "Withdrawal" is the buyers' privilege. "Delivery" is the seller's obligation. Without such a provision in the contract, if the buyer ordered out an unreasonably large quantity of the sugar to be shipped upon a particular day and the sellers found themselves unable to deliver the entire amount as ordered on that day, it might have been construed by the buyer that such inability on the part of the sellers to ship on that day amounted to a breach of the contract and relieved the buyer from any further obligation. The "withdrawal" clause in the contract merely prevented the buyer from making demands with which the sellers might not be able to comply, with due regard to their obligations to other customers. The buyer's withdrawals, therefore, during the contract period for delivery were to be subject to approval of the sellers' credit department.

The clause relieving the sellers from performing, for causes beyond their control, is so usual and customary that a discussion thereof seems superfluous. Such clauses have been uniformly upheld.

**13 C. J. 337,**
**37 Cyc. 247, 248,**
**Williston on Sales §661 (c), Sec. Ed.**

We do not understand that the Defendant contends that the customary clause relieving the seller from performing for causes beyond his control would prevent the contract from being mutual. The contention, as we understand it, is that the clause in these particular contracts is broader than is customary, particularly that clause relieving the seller,

> "If the supply of raw material of the refinery manufacturing the sugar should be interrupted by any such cause."

It is said that the sellers might select some sugar refinery whose supply of sugar had been interfered with and claiming that such refinery was the one from which it was expected to obtain the sugar thus relieve themselves from all liability under the contract. It is submitted that this is a most strained and unnatural construction. Before the sellers could be relieved under this clause, it would be necessary for them to show that they have made a valid subsisting contract with a refinery to manufacture the sugar to be delivered to the buyer under the contract, and that the supply of raw material of this particular refinery had been interrupted by war, strike, accident, fire or other causes beyond control. As was said by the Court of Appeals of Georgia construing this identical language:

"This provision must be given a reasonable construction and will not be construed as intended to permit the seller to perform a palpably dishonest act and perpetrate a fraud upon the purchaser by selecting a refinery crippled and incapacitated in the manner described."

**Slater v. Savannah Sugar Refining Corporation, 28 Ga. App. 280, 284, 110 S. E. 759, 761.**

Contracts in the same form as those in the instant case have been attacked upon precisely the same grounds as are here urged and have been uniformly held to be bilateral and mutually binding.

**W. H. Goff Company v. Lamborn & Company (C. C. A. 5th Cir.), 281 Fed. 613, affirming District Judge Evans of the Southern District of Georgia.**

**LaGrange Grocery Company v. Lamborn & Company (C. C. A. 5th Cir.), 283 Fed. 869, 872, affirming District Judge Sibley of the Northern District of Georgia.**

**Traub v. Savannah Sugar Refining Corporation, 28 Ga. App. 285, 110 S. E. 761, and**

**Slater v. Savannah Sugar Refining Corporation, 28 Ga. App. 280, 110 S. E. 759, affirming Judge Meldrim of the Eastern Circuit of Georgia.**

In the last cited case it was well said:

"Where an instrument in writing, purporting to be a bilateral contract, contains mutual promises, which without more and when taken independently of certain subsidiary provisions in the instrument would render the instrument valid as a contract, such subsidiary provisions will not, unless their terms imperatively demand it, be given a construction that will nullify and

completely destroy the entire obligation of either party under the instrument and thus render the instrument lacking in mutuality and void."

The general rule, as gleaned from a number of decisions, is stated in Corpus Juris as follows:

> "Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract. So a contract should be construed in favor of mutuality and of certainty."
>
> **13 C. J. 539.**

## II.

## THE DEFENSE BASED ON THE SHERMAN ANTI-TRUST ACT

The Defendant filed a special plea (paragraph 30 of the answer, transcript p. 30), in which it undertook to set up that the contracts upon which suit was entered and the conduct of the Plaintiffs, of which these contracts were a part were

> "In violation of the laws of the United States, and especially of the anti-trust laws of the United States; and said contracts directly affected interstate commerce and were conspiracies in violation of the laws of the United States, the enforcement of which contracts in this case would be to make effectual such conspiracies."

While it is not clear from the answer, it appears from the assignments of error and Defendant's brief that the law referred to is the Act of July 2, 1890, known as the Sherman Anti-Trust law. From a

cursory reading of the answer, it is apparent that the allegations do not measure up to the requirements of a good plea under the rulings of this Court.

Briefly summarized the answer alleges that the Plaintiffs conspired, combined, and confederated with the Savannah Sugar Refining Corporation and "other refiners of sugar unknown to the Defendant" for the purpose of restraining trade and competition in the sale of sugar in the Southeastern States. No facts in support of this allegation are pleaded. It is alleged that in pursuance of this conspiracy and in order to unduly increase the price of sugar in inter-state commerce, Plaintiffs and other sugar refiners changed their method of doing business and instead of making allotments of sugar to wholesale grocers as they had theretofore done, they partially discontinued allotments and required contracts for future delivery of sugar; that the Savannah Sugar Refining Corporation declined to sell to the Defendant and advised the Defendant and others that there was a shortage of sugar and that contracts for future delivery should be entered into if the buyers wished to fill their requirements; that Plaintiffs, theretofore brokers became sellers of refined sugar, bought large quantities of raw sugar in Cuba and stored it at the refineries; that the conspirators created the impression that there was a shortage of sugar and were able in this way to make an unreasonable profit on their sales.

This is the extent of the allegations with reference to the Acts of Congress which it is charged Plaintiffs violated.

It may be observed in the first place that the sales in question were not in inter-state commerce. The contracts were made in Georgia; the sugar was to be

delivered in that State; the price was f. o. b. Savannah Refinery, Port Wentworth, Georgia, indicating that it was to be shipped from that point. In the usual course of transportation, the shipment would not move beyond the limits of the State. It seems apparent, therefore, that inter-state trade or commerce could not be affected by the contracts which are under attack.

The allegations as to the illegal combination, or conspiracy are mere conclusions of the pleader, without one single fact being stated upon which the conclusions can be based. They are, therefore, wholly insufficient.

**Witherell & Dobbins v. United Shoe Machinery Company (C. C. A. 1st Cir.), 267 Fed. 950.**

The mere fact that sellers of sugar discontinued the practice of making allotments of sugar is of no consequence. The system was inaugurated and maintained by direction of the Food Administration. It was discontinued by reason of legislative enactment. By the Act of December 31, 1919 (41 Stat. L. 386), the zone system for the distribution of sugar under which allotments were made, was formally and definitely abandoned. But even if the change in the method of doing business had not been brought about by reason of government control, the mere fact that sellers of sugar, whether acting individually or in concert, decided to change from one legal method to another equally lawful, would not impair or affect the validity of contracts made under the new method.

The allegations of monopoly and restraint of trade are entirely insufficient. Like those as to the conspiracy, they are mere conclusions of the pleader, no facts being alleged upon which to base such conclusions.

What proportion of the available supply of refined sugar was, or could have been, controlled, is not alleged. The effect which the alleged conspiracy might have had upon the available supply cannot be determined from any allegations in the pleadings.

But if the answer had set up facts sufficient to show that there was a conspiracy and that the effect of the conspiracy was to create monopoly, or restrain inter-state trade, the plea would still be demurrable because there appears to be no connection, or relation, between the alleged unlawful conspiracy and the sales of sugar involved in this case. The Defendant's contention appears to be that a conspiracy was entered into to restrain the supply and thereby enhance the price of refined sugar; that sellers withdrew sugar from the market and in some instances refused to make contracts with wholesale grocers. A sale of sugar, such as that involved in the present case, does not effectuate and could not be in furtherance of such a conspiracy. On the contrary, it directly defeated the purpose of the conspiracy. Instead of tending to a monopoly its manifest tendency was directly the opposite. Sales break markets. It is certainly a paradox to say that by selling sugar to the Defendant for future delivery, a conspiracy to monopolize the commodity is furthered. Even, if it should be conceded that the allegations are sufficient to show a conspiracy in restraint of trade, the facts with regard to these contracts and their relation to the supposed conspiracies, bring the case squarely within the rule announced by this Court in the Connolly case. A short extract from the opinion delivered by Mr. Justice Harlan, we think, establishes the correctness of our position beyond controversy:

"If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the Act of Congress, then all those persons, corporations, or associations directly connected therewith, became subject to the penalties prescribed by Congress. But the Act does not declare illegal or void any sale made by such combination or by its agents, of property acquired or which came into its possession for the purpose of being sold,—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the Act of Congress; for Congress did not declare that a combination illegally formed under the Act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

**Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 550, 46 L. ed. 679, 686.**

Defendant contends that the Connolly case has been modified by the Continental Wall Paper Company case and that the facts set up in the answer bring the

case within the ruling of the latter decision. We connot agree with either contention. The Wall Paper case was decided on its own peculiar facts. Mr. Justice Harlan, who spoke for the majority of the Court referred at length to the Connolly case as stating the correct rule of law. He distinguished the Wall Paper case saying:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly case."
>
> **Continental Wall Paper Company v. Louis Voight & Sons Co., 212 U. S. 227, 261, 53 L. ed. 486, 505.**

If any doubt existed as to the effect of the Wall Paper case on the rule announced in the Connolly case, it was set at rest by the decision in the Corn Products Refining Company case. An effort was made in that case to draw a distinction between the Wall Paper and Connolly decisions and to come within the ruling announced in the Wall Paper case. Pointing out the fallacy of the reasoning of Counsel, Mr. Chief Justice White delivering the opinion of the unanimous court, said:

"But, in substance, this only assumes that it was held in the Continental Wall Paper case that that which was inherently legal can be rendered illegal by considering in connection with it something which there is no right to consider at all. But it is apparent on the face of the opinion in the Continental Wall Paper case that it affords no ground for the extreme and contradictory conclusion thus deduced from it, since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case, which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been, in and of itself, directly to sanction and give effect to a violation of the anti-trust act inhering in the sale. It is not necessary to analyze the facts and issues in the case for the purpose of pointing out how completely they are covered by the statement just made, because the opinion of the court and the reasons stated by the members of the court who dissented, without more make that fact perfectly clear. Indeeed, not only does this statement make clear the fact that there is no conflict between the Connolly case and the Continental Wall Paper case, but it also establishes that both cases, the first directly and the other by a negative pregnant, demonstrate the want of merit in the contentions here insisted upon."

**D. R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, 177, 59 L. ed. 520, 527.**

It is obvious that none of the elements of illegality existing in the contract in the Wall Paper case can be found in the case sub judice. There is nothing inherently unlawful in selling sugar. There were no relations between the contracting parties other than that of buyer and seller. It is not alleged that the seller did not own the sugar. No obligations whatever were exacted of the buyer, save the payment of the agreed price for the sugar purchased. To allow the seller to enforce payment of the price would not be to sanction, or to give effect to any supposed violation of the Anti-Trust Acts. The facts pleaded show no relation between the sales and the alleged illegal acts. The pleadings here were not as strong from the standpoint of the Defendant as in the Connolly case. They do not go nearly to the extent of those in the Wilder case. They fall far short of the allegations in the Wall Paper case.

These decisions establish that the Sherman Anti-Trust Act "does not invalidate or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining inter-state trade in such goods."

**Hadley Dean Plate Glass Co. v. Highland Glass Co. (C. C. A. 8th Cir., Van Devanter, Circuit Judge), 143 Fed. 242 (4).**

The Wilder case is authority for the proposition that the Sherman Act prescribed its own penalties and provides its own remedies for enforcement, and that these penalties and these remedies are exclusive. The Act does not provide that contacts made by the members of an illegal combination are unenforceable

and the Court will not undertake to add this additional penalty. It is only when the contract is an integral part of the combination and its enforcement will directly further the combination, that the Court will refuse to compel a party not a member of the combination to comply with his contracts. The remedy provided by the Act is to be enforced on behalf of the whole public through the Department of Justice. It was never intended that private individuals in their own interest, should enforce the Act or claim relief from their contracts on account of the illegality of the combination in no way concerned with the contract itself. The opinion in the Corn Products case follows a long line of decisions by this Court, in which these principles have been thoroughly established.

It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive. Thus it has been held that a bill filed by minority stockholders to set aside a sale of all the property, of every kind, of a mining company because the purchase was made in pursuit of the purpose of the purchaser and its associates to monopolize the production of copper, and to restrain the sale of it in inter-state commerce in the markets of the world, will not be entertained.

**Geddes v. Anaconda Copper Mining Co., 254 U. S. 590, 593, 65 L. ed. 425, 430.**

See also:

**Union Pacific R. Co. v. Frank (C. C. A. 8th Cir.), 226 Fed. 906.**

III.

DEFENSES BASED ON THE LEVER ACT

Defendant amended its answer (Transcript p. 41),

and set up at great length certain alleged violations of rules 6, 7, 8 and 10 of the Food Administration, purporting to have been passed pursuant to the authority of the National Defense, or Lever Act, approved August 17, 1917. (40 Stat. C. 53 p. 276, Comp. St. 1918, and Sup. 1919, 3115⅛e,—3115⅛kk, 3115⅛l,—3115⅛v.) It was charged that the Plaintiffs, who had theretofore been brokers, purchased a large quantity of sugar from the Savannah Sugar Refining Corporation, which they resold to the former customers of the Refining Corporation, this being in pursuance of a conspiracy between the Plaintiffs and the Refining Corporation and "others unknown" to withdraw the Refinery from the market, create the impression that there was a scarcity of sugar and thereby secure an unreasonable profit.

1.

Attention is directed to the facts stated in the several paragraphs of the amended answer. Stripped of the conclusions of the pleader and the unsupported insinuations and charges, the facts alleged do not show any violation of the rules of the Food Administration which are invoked. Plaintiffs made certain sales to Defendant at what are charged to be excessive and unreasonable prices. These sales 'kept the commodity moving to the customer in a direct li and could not be a violation of Rule 6. In makir the sales Plaintiffs 'held themselves out as merchants' and, therefore, did not violate Rule 7. The sale was to a jobber, and not to another broker, hence there could be no violation of Rule 8. The sale while it is charged to have been at an unreasonable price was not "for the purpose of unreasonably increasing the price, or restricting the

supply or monopolizing the commodity", which practices are forbidden by Rule 10.

Paragraphs F and L of the amended answer attempt to charge a conspiracy with the Savannah Sugar Refining Corporation "and other persons unknown" for the purpose of hoarding sugar in violation of Section 5 of the Lever Act. But the act complained of is the sale to the Defendant. Selling is the antithesis of hoarding. (Transcript pp. 45, 47.)

Paragraph K alleges that the President fixed a profit of one cent per pound on refined sugar and that the Plaintiffs exacted a profit of from eight cents to ten cents a pound. (Transcript p. 47.)

All these allegations amount to is that Plaintiffs sold sugar at an unreasonable profit and at a profit in excess of that fixed in the President's order.

2.

That part of Section 4 of the Lever Act, as re-enacted October 22, 1919, making it unlawful for any person willfully "to make any unjust or unreasonable rate in handling or dealing in or with any necessaries", has been held to be unconstitutional as it fixed no ascertainable standard of guilt, but "penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the Court and jury."

**United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. ed. 516.**

And the provision penalizing a conspiracy "to exact excessive prices for any necessaries" was likewise held unconstitutional for the same reason.

**Weeds, Inc., v. United States, 255 U. S. 109, 65 L. ed. 537.**

But it is insisted that these were criminal cases and that while the provisions of the statute were held to be unconstitutional as too vague and indefinite to constitute crimes, they are nevertheless valid and enforceable as civil regulations. We do not so understand the effect of the decisions.

An Act of Congress in violation of the Constitution is

> "as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

No purpose can be manifested by an unconstitutional statute "since it is not law for any purpose".

> **Chicago I. L. R. Co. v. Hackett, 228 U. S. 559, 567, 57 L. ed. 966, 969.**

In the oft quoted language of Mr. Justice Field:

> "An unconstitutional Act is not law; it confers no right; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
>
> **Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 186.**

An unconstitutional law "is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous but is illegal and void."

> **Ex Parte Siebold, 100 U. S. 371, 25 L. ed. 717, 719.**

Counsel for Plaintiff in Error in their brief say:

> "The fact that this Court in U. S. v. Cohen held the Lever Act to be void as a criminal statute

does not, as said by this Court in **Levy Leasing Co. v. Siegel, 258 U. S. 242,** make invalid the statute as a civil regulation."

(Plaintiffs' brief pp. 6 and 7.)

The Court did not say in the Siegel case that the Lever Act was good as a civil regulation. The Court distinguished the Cohen case, saying that case "dealing with definitions of crime, is not applicable". This is the only reference to the case in the opinion. We do not construe this as an intimation that this unconstitutional statute is valid in any particular or for any purpose.

Counsel also say that the Court in **Addy Co. v. United States, 264 U. S.—, 68 L. ed. 348** "recognized the validity of the Lever Act and of the President's regulations thereunder." (Plaintiffs' brief p. 6.) In the Addy case the Court was considering Section 25 of the Lever Act and not Section 4, which alone was involved in the Cohen Company and Weeds cases, but so far from recognizing the constitutionality of the Section then under consideration the Court purposely adopted a construction which enabled it to avoid deciding its constitutionality. Said Mr. Justice McReynolds:

"If it (the order of the Fuel Administration), be construed as applying to the sales of coal purchased by petitioners prior to August 23rd we must decide a grave constitutional question. Not necessary to consider if another view be accepted. * * * If this difficulty can be eliminated by some reasonable construction of the order, it should be accepted."

And again he said:

"We are not unmindful of the forceful argument

to the contrary and we consciously refrain from indicating an opinion respecting the validity of the order as interpreted."

Plaintiff cites a number of cases holding the Lever Act to be valid. Only one of these, **Henrikson v. Pacific Coast Packing Co., 187 Pacific, 377,** was based on Section 4 of the Act. The Henrikson case was decided a year before the Cohen Grocery Company case. Doubtless the Supreme Court of Washington would have followed the Cohen Grocery Company case had it been decided when the Henrickson case was under consideration.

The case of **Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489** was based on the Twenty-fifth section of the Act. And **Ayulo v. Mollen Thompson & James Co., 283 Fed. 863** and the other cases cited on page 7 of the Plaintiffs' brief held that a seller of necessaries who under Section 5 of the Act and the proclamations of the President was required to be licensed could not recover the price of necessaries sold where no license had been obtained.

No case has been cited, nor do we think any can be found since the decision in the Cohen Grocery Company case, which upholds for any purpose those portions of Section 4 which this Court has declared unconstitutional.

The contention urged in this case, that the Lever Act while unconstitutional as a penal statute is valid as a civil regulation, has been well answered by the Court of Appeals of New York. The Court, speaking through Cardozo, J. said:

"The United States Supreme Court has held the prohibition of the Lever Act a nullity be-

cause too vague to be intelligible. The consequences of its decision are not limited to criminal prosecutions but apply to civil suits as well."

**Standard Chemical Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566.**

A similar conclusion was reached by the Court of Civil Appeals of Texas in

**Dunman v. South Texas Lumber Co., 252 S. W. 274.**

The Sections of the Act with reference to unreasonable profits and the fixing of prices and conspiracies with regard thereto being inoperative and invalid, the proclamations of the President and the regulations of the Food Administration passed pursuant to these invalid provisions are themselves invalid and of no force, and Plaintiffs cannot be called into account criminally nor do they lose any rights civilly on account of the violation of any of these administrative regulations.

3.

It may be suggested that the authority of the President 'to make regulations and issue orders essential to the national security and defense, to secure an adequate supply and an equitable distribution of foods' was derived from the first Section of the Act, and that the licensing system was provided for in the fifth Section, neither of which have been declared invalid by this Court.

The first Section is the preamble of the Act, stating in general terms its purpose and the necessity for its adoption and conferring upon the President the authority to issue such orders as were essential to

accomplish the results proposed. This Section did not give the President any power to fix prices. The only provision on the subject, in the entire Act so far as foods are concerned, are the two clauses of the fourth Section which the Court has declared to be invalid.

This contention also has been considered by the Court of Appeals of New York in the Standard Chemical Company case, supra. Said Judge Cardozo:

> "The promulgation by the President of an order fixing prices did not save the statute which it was intended to effectuate. The provision 'to make such regulations and issue such orders as are essential effectively to carry out the provisions of this Act' cannot be read as a delegation of authority to fix the prices for all articles which the statute classifies as necessaries. Congress prohibited inequitable and unreasonable conduct but there is no evidence that in doing so it made the President its delegate to design and standardize the patterns of equity and reason."

And the Circuit Court of Appeals for the Fifth Circuit said:

> "The Food Administration could not under the provision of the Act of Congress (citing the several sections of the Lever Act), which created it, arbitrarily fix the price at which future sales should be made."
>
> **Pharr & Sons Ltd. v. C. D. Kenny Co., 272 Fed. 37, 41.**

In this case a certiorari was denied.

> **Pharr & Sons Ltd. v. C. D. Kenny Co., 257 U. S. 649, 66 L. ed. 415.**

In a suit brought by the Plaintiffs in the instant case upon a similar contract, the Defendant being

represented by the same distinguished Counsel who now appear for the Defendant in the case sub judice, defenses in parctically the same terms were interposed, and the Circuit Court of Appeals for the Fifth Circuit sustained an order of District Judge Evans striking the defenses on demurrer. The Court speaking through King, Circuit Judge, said:

> "Defendant further pleaded that under the Lever Act the United States controlled the price of sugar and that the President had fixed a profit of one cent per pound on sales of sugar at wholesale, and that therefore the only profit in contemplation of the parties was one cent per pound. We think this defense was properly stricken on demurrer under the ruling of this Court in Pharr & Sons Ltd. v. Kenny Co., 272 Fed. 37, 41.
>
> "The special pleas alleging violations of the Lever Act as grounds for nonliability of the defendant under its contract for the purchase of sugar from plaintiffs afforded no ground of defense, and the demurrers thereto were properly sustained. There were no facts alleged which showed that the contracts were entered into otherwise than voluntarily by the defendant, nor any sufficient allegations of any fraudulent misrepresentation of facts by which its agreement was induced. The defendant was therefore bound by the agreements made with plaintiffs. Wilder Mfg. Co. v. Corn Products Co., 11 Ga. App. 588, 75 S. E. 918; id. 236 U. S. 165, 35 Sup. Ct. 398, 59 L. ed. 520, Ann. Cas. 1916 A, 118."
>
> **W. H. Goff Co. v. Lamborn & Co., 281 Fed. 613, 617.**

This Court denied a certiorari in this case also.

> **W. H. Goff Co. v. Lamborn & Co., 260 U. S. 734, 67 L. ed. 487.**

Section 5 of the Lever Act authoritizes the licensing of dealers in commodities classed as necessaries, and provides as the penalty for a violation of the rules governing licensees, the revocation of the license.

This Section further provides:

> "Whenever the President shall find that any storage charge, commission, profit, or practice of **any licensee** is unjust, or unreasonable, or discriminatory and unfair, or wasteful, and shall order **such licensee,** within a reasonable time fixed in the order, **to discontinue the same,** unless such order, which shall recite the facts found, is revoked or suspended, **such licensee** shall, within the time prescribed in the order, discontinue **such** unjust, unreasonable, discriminatory and unfair storage charge, commission, profit or practice. The President may, in lieu of any **such** unjust, unreasonable, discriminatory and unfair storage charge, commission, profit or practice, find what is a just reasonable, non-discriminatory and fair storage charge, commission, profit or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence." (Emphasis ours.)

It is manifest from this Section that it was not the purpose of Congress to confer upon the President the authority to fix by general rule the profit at which future sales of necessaries could be made. It was a condition precedent to the exercise of authority by the President that he should find a licensee to be making an unjust or unreasonable charge or profit. There is no suggestion that in the case sub judice he ever so found as to the Plaintiff. The finding of the President as to what is a just or reasonable profit was not in-

tended to be general in its application but was to apply only to the particular licensee who had theretofore been exacting, or attempting to exact, an unreasonable or unjust rate or charge. The language of the Act is that whenever the President finds that the profit "**of any licensee**" (not of sellers generally), is unjust or unreasonable, he may order "**such licensee**" to discontinue the same but his order must recite the facts found. This contemplates an investigation as to the conditions under which the particular licensee was doing business and as to the profit charged.

If the Act had authorized the arbitrary fixing of a profit to be charged, it would have violated the due process clause of the Constitution, for,

> "The due process clause requires that every man shall have the protection of his day in court and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that any citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."
>
> **Truax v. Corrigan, 257 U. S. 312, 332, 66 L. ed. 254, 263.**

> "The right to contract about his own affairs is part of the liberty of the individual protected by the due process clause of the Federal Constitution."
>
> **Adkins v. Childrens' Hospital, 261 U. S. 525, 67 L. ed. 785.**

Plaintiffs' business is not clothed with a public use so as to be subject to regulations by the public.

> **McFarland v. American Sugar Ref. Co., 241 U. S. 79, 60 L. ed. 899.**

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. * * *

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes; and while this feature does not necessarily exclude businesses from the class clothed with a public interest, it usually distinguishes private from quasi public occupations. * * *

"But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large."

**Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 1109, 1110.**

We think it is clear, therefore, that the rules of the Food Administration so far as they attempt to fix the price of commodities classed as necessaries can derive no force either from the First or the Fifth Sections of the Act. Whatever validity it may have been thought they possessed was by virtue of the Fourth Section, the unconstitutionality of which has been finally established by the decisions in the Cohen Grocery Company and Weeds cases.

5.

But it may be contended that some of the rules of the Food Administration, which the Plaintiffs are charged with violating, were made with a view to preventing the hoarding of necessaries, and that the Food Administration had the right to adopt these rules under the licensing provisions of the Fifth Section and the provisions against hoarding in the Sixth Section.

Both of these Sections provide penalties for their violation. Neither of them undertake to declare contracts made in violation of them to be invalid. Since the statute creates the right and provides a special remedy for its violation, that remedy is exclusive.

> "Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."
>
> **Barnet v. Muncie National Bank, 98 U. S. 555, 25 L. ed. 212.**
> **Wilder Mfg. Co. v. Corn Prod. Co. 236 U. S. 165, 59 L. ed. 520;**
> **Oates v. First National Bank, 100 U. S. 239, 25 L. ed. 580.**

6.

There is a popular notion that Congress under the War Powers may do virtually anything it pleases without regard to Constitutional limitations or the guarantees for the protection of the citizen. This Court has set its face firmly against any such doctrine. The theory was advanced in the Cohen Grocery Co. case to sustain the price fixing regulations of this Act, but said Mr. Chief Justice White:

"We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. Ex parte Milligan, 4 Wall. 2, 121-127, 18 L. ed. 281, 295-297; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso. 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; United States v. Cress, 243 U. S. 316, 326, 61 L. ed. 746, 752, 37 Sup. Ct. Rep. 380; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 156, 64 L. ed. 194, 199, 40 Sup. Ct. Rep. 106. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view."

**United States v. Cohen Gro. Co., 255, U. S. 81, 88, 65 L. ed. 516, 520.**

7.

Even if any valid constitutional provision of the Act or regulation of the Food Administration based thereon can be found which the facts alleged show the Plaintiffs violated (and it is significant that the able counsel for the Defendant has not attempted to point out any such provision or regulation), there is nothing to indicate that Congress intended the violation of the Act should render contracts of sale void and the purchase money uncollectible.

"Where a statute prohibits an act or annexes a penalty to its commission, it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it."

**Harris v. Runnels, 12 Howard, 78, 13 L. ed. 901.**

The rule announced in this case has been repeatedly applied by this Court and has become an established canon of interpretation.

**Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317.**
**Logan County Bank v. Townsend, 139 U. S. 67; 35 L. ed. 107.**
**Dunlop v. Mercer (C. C. A. 8th Cir.), 156 Fed. 545.**

Before a contract can be held illegal as violative of a penal statute it must be clearly within the prohibitions of the law and if there is a fair doubt as to whether it is embraced within such prohibitions the doubt will be resolved in favor of the contract.

**In re Johnson, 224 Fed. 180, 185, 186.**
**Guffey-Gillespie Oil Co. v. Wright, 281 Fed. 787.**

It is now well settled that when a statute imposes specific penalties for its violation, and the object of the statute can be accomplished without declaring invalid contracts in violation of its prohibitions, the inference is, that it was not the legislative intent to render such contracts illegal and unenforceable.

**Adams Express Co. v. Darden, 286 Fed. 65.**

"The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and

it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision."

**Union National Bank v. Matthews, 98 U. S. 621, 627; 25 L. ed. 188, 189.**

This is the well established rule. Where the penalties for violation of an act are prescribed but none of them includes the invalidation of contracts, generally they are not invalid where the act is violated.

**Thompson v. St. Nicholas Bank, 146 U. S. 240, 36 L. ed. 956.**
**Hanover National Bank v. First National Bank, 109 Fed. 421, 426.**
**Border National Bank v. American National Bank, 282 Fed. 73, 75.**

While considering the question of legislative intent it should be borne in mind that by the Act of December 31, 1919 (41 Stat. L. 386), Congress in terms enacted that sugar should be permitted to be sold and to circulate freely in every portion of the United States. The contracts involved in the case sub judice were made in the summer of 1920, after this Act had gone into effect.

The situation then is this: Section 4 of the Lever Act so far as applicable to the facts of the instant case has been declared unconstitutional; Sections 5 and 6, as did Section 4, provide specific penalties for their violation which may well be considered as exclusive. Congress did not expressly declare that sales made in violation of the Act should be void; Congress did declare that after December 31, 1919, sugar should be permitted to be sold and to circulate freely in every portion of the United States.

It is hardly conceivable that through an Act as indefinite and uncertain in its terms as the Food Control Act it could have been intended by Congress to call in question before juries over the country the legality of every contract entered into for the sale of a necessary of life. Surely, the business world would never have consented to make sales had this been recognized as the legislative intent. Even if it had been so intended by the original Act, it seems clear that since the amendment of 1919, mentioned above, Congress has put the question beyond the possibility of debate.

If the Defendant's contention should be sustained, it would follow that a purchaser could take goods worth hundreds of thousands of dollars, keep them and use them as his own, or sell and dispose of them, refuse to pay, and successfully resist all efforts to collect the purchase price.

The remedy provided by Section 5 for an unfair practice or the exaction of an excessive rate or charge is revocation of the license. The remedy so provided is exclusive, and the Court should not add a further penalty by declaring contracts of this character void. Think of the inequalities that would arise! On a small contract, the seller might be punished by the loss of a modest sum. On a large contract, the penalty might be millions of dollars.

The following language of Sir George Jessel, M. R., in **Printing, Etc., Co. v. Sampson, L. R. 19 Eq. 465,** has been quoted with approval by this Court:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more

than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

**Baltimore & Ohio Ry. v. Voight, 176 U. S. 498, 505, 44 L. ed. 560, 565.**

It will be remembered that the illegality declared by the Food Control Act was not an illegality of a contract of sale—the act does not prohibit the sale of necessaries. On the contrary, it was intended to encourage them. Sales in violation of the Act were not made unlawful. The illegality only inhered (if at all), in the excessive rate of charge. It differs, therefore, from such Acts as forbade the sale of intoxicating liquor, without complying with certain conditions precedent to the right of sale, such as the obtaining of a license. For these reasons cases like **Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759,** cited by Defendant are not in point.

The case of **Burck v. Taylor, 152 U. S. 634, 38 L. ed. 578,** cited by opposing counsel, seems also to be inapposite. In that case the Court had no statute before it for construction but only the terms of a contract, and it was clearly recognized that not every contract in contravention of a statute is void, and the courts will search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not.

The case of **Waskey v. Hammer, 223 U. S. 85, 56 L. ed. 359,** involved two placer mining claims in Alaska,

which had been claimed by a United States Mineral Surveyor in violation of an Act of Congress which prohibited employees of the Land Office from entering or becoming interested directly in any of the public lands of the United States. Such statutes, of course, should be construed broadly in the interest of the general government.

Cases which hold that contracts for the sale of commodities for which licenses were required under the 5th Section of the Lever Act and the Proclamations of the President passed pursuant thereto are controlled by the principle announced in Miller v. Ammon, supra. The 5th Section provides that no person shall engage in or carry on any business for which a license is required unless he shall secure and hold a license issued pursuant to the Section, and the engaging in business by an unlicensed dealer is punishable by fine and imprisonment. Congress deemed it necessary for the winning of the war that government control over necessaries should be established. It therefore provided for the licensing of dealers in these necessaries and made the obtaining of a license a prerequisite to engaging in business. The securing of a license was a definite, specific act. The failure to procure it was illegal and it has therefore been held that contracts made by an unlicensed dealer were illegal and unenforceable. But this is altogether different from the acts complained of in the instant case. Here it is charged that the Plaintiffs, licensed dealers, made an illegal profit and the contracts are sought to be set aside upon this ground. The difficulty of applying the statute can be no better stated than in the language of the Chief Justice in the Cohen Grocery Company case:

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigations which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. * * * This condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution."

Surely it was not the purpose of Congress to declare void and unenforceable contracts which a Court or jury might perhaps conclude were made in violation of such a standard, or rather we should say, where there was no standard capable of enforcement.

In the language of the Court of Appeals of New York:

"A prohibition so indefinite as to be unin-

telligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty. The Act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the test of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the unchartered sea of subjective prejudice and favor. The arbitrium boni viri, unrestrained and undirected, becomes the test of right and wrong. I do not say that the law-making body is incompetent, in time of war, to compel the trade to accept such prices for his commodities as juries may consider fair. That question is not here. I am concerned now with the question whether there is an offense against the public order, bringing down upon his contracts, as a consequence, the penalty of illegality and forfeiture if he fails to adjust behavior to ideals of equity and wisdom as varied as the minds of men. Offending contracts are not merely modified, their exactions scaled down to conform to the finding of right reason as declared by court or jury after the event. They are wiped out altogether, their exactions adjudged illegal, their makers viewed as malefactors, for failure to conform to the unknown and unknowable. I do not attempt to consider whether the act might have been so restricted or interpreted as to save its validity either wholly or in part. Since the decision of the Supreme Court, the fact of indefiniteness is no longer open to inquiry. The lack of any standard, either expressly established, or ascertainable with approximate certainty from sources allunde is to be accepted as a datum. Disobedience is impossible unless there is something to be obeyed."

**Standard Chem., Etc., Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566, 567.**

## IV.

## THE REJECTED EVIDENCE

The Defendant attempted to prove by its President and also by another of its officers and by a local jobber specific sales of sugar made by them to the retail trade in and around Macon, Georgia, furing the period following the rejection of the sugar by the Defendant and its resale by the Plaintiffs. This evidence was excluded.

The suit involved 300 barrels of sugar, a barrel containing 350 pounds, or 105,000 pounds. The question was whether the Plaintiffs exercised proper diligence in the resale of this sugar after its rejection by the Defendant. The Plaintiffs introduced market quotations from the standard trade journal (Willett & Gray's Sugar Bulletin), and proved by two uncontradicted witnesses that the prices quoted obtained in the Macon market during the period in question. The resales realized the full market price as shown by these quotations.

The testimony offered by the Defendant and excluded by the Court tended to establish at what prices certain local jobbers sold small lots to retail customers. It could not illustrate the market price of sugar in the wholesale trade, that is, refiners' prices to wholesale customers. Defendant endeavored to show that jobbers added a small percentage to the refiners' prices and that by deducting this percentage the refiners' price could be established. But its witnesses admitted that during the period in question the market was so demoralized that there was no standard, the witnesses stating that they sold sugar for what they

could get regardless of what it cost them. There was therefore no basis of calculation. The testimony was without probative value and could only have tended to confuse the jury and furnish a false basis of calculation.

It has frequently been held that market reports in standard trade journals are recognized authority for the determination of market values.

> "Market reports in newspapers, such as the commercial world rely upon, are competent as evidence of state of markets. Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries."
>
> **Sisson v. Cleveland R. R. Co., 14 Mich. 489, 90 Amer. Dec. 252.**
>
> "Where prices of grain on the open market with specific dates are properly shown by authentic publications or trade bulletins accepted by grain dealers generally as standards, testimony of a grain dealer as to individual transactions or bargains on the board of trade is not admissible on the issue of market prices."
>
> **Fahey v. Updike Elevator Co. (Neb.), 166 N. W. 622.**
>
> **Gerhart v. Harris County (Texas Civil Appeals), 244 S. W. 1103.**

The question was not whether the sugar brought its full market price but only whether the sale for the account of the Defendant was fairly conducted after proper notice to the Defendant and with an honest effort to get the best price obtainable. Plaintiffs' witnesses detailed at considerable length the efforts which they made to dispose of the sugar. They described the chaotic condition which existed in the sugar

trade, the extreme difficulty in disposing of any large quantity for the reason that most dealers had considerable stocks of high priced sugar which they were endeavoring to sell on a rapidly declining market to save themselves from as much loss as possible, the fact that buying was altogether "hand to mouth". But in spite of these conditions the sugar was sold at the market price as shown by the recognized market quotations. It is submitted that the fact that the Defendant may have sold to certain retail customers a few hundred pounds at a slightly increased price did not show, or tend to show, that Plaintiffs did not exercise due diligence and make reasonable efforts to obtain a fair price for the sugar sold.

> "If the vendee in a sale of goods refuses to take and pay for them, the vendor may sell the property, acting for this purpose as agent of the vendee, and recover the difference between the contract price and the price of resale. When the vendee is notified by the vendor of the intention to resell, and after such notice a sale is properly made, the vendee is conclusively bound by the resale and the amount realized under it."
>
> **Mendel v. Miller & Sons, 126 Ga. 834 (1);**
> **Green v. Ansley, 92 Ga. 647;**
> **Davis Sulphur Ore Co. v. Atlanta Guano Co., 109 Ga. 607, 609.**

## V.

## THE VERDICT WAS PROPERLY DIRECTED

The Defendant's whole case was planted on the invalidity of the contracts which it admitted executing and breaching. After the sugar was rejected notice was given of Plaintiffs' intention to resell and the

prices which were offered for the sugar were submitted to the Defendant and it was given an opportunity to raise these offers. The sales were made at the prices of which Defendant was advised and the Defendant was given credit for the amount received.

Defendant contends that it is a question for the jury as to whether or not the resales were had within a reasonable time after the sugar was rejected. This is of course true, if under the circumstances surrounding the transaction there could be any question as to the reasonableness of the time. But there was no such question in this case.

The sugar was deliverable in installments. The July installment was shipped, accepted and paid for. The August shipment was actually made in accordance with shipping instructions given by Defendant. But when this shipment arrived Defendant refused to accept it. At Defendant's suggestion it was stored "for the good of whom it may concern." The Defendant continued to decline to accept this shipment or to order out the September installment.

On September 27th, Plaintiffs requested shipping instructions for the September portions of the contracts and notified Defendant that failure to order out the sugar within forty-eight hours would be treated as a breach of the contracts and the sugar would be sold for its account.

September 30th was the last delivery day under the contracts. On October 11th Plaintiffs secured a bid for the sugar already shipped and communicated this bid by wire to Defendant. Defendant declining to raise the bid, the offer was accepted and the sugar sold. On October 15th, Plaintiffs received an offer for the remainder of the sugar, which it also promptly

communicated to the Defendant. Defendant making no better offer, this bid was accepted, and the sugar sold. There was a slight delay in shipping the sugar, however, and the purchaser declined to take it. It was held at destination for a few days but finally sold to the same customer at one-fourth cent per pound over the bid of October 15th, Defendant being given benefit of this increase in the price.

As was said by the Court in directing the verdict:

> "There was no obligation to sell the sugar before the first of October. The sale was made one-half on the 11th and one-half on the 16th of October. There was evidence on the part of the Plaintiffs, that of Mr. Ruan and Mr. Lamborn, as to the various efforts which were made to sell the sugar. It was shown that with this most unusual condition of the sugar market, and particularly with this Plaintiff—there is no evidence as I recall that contradicts their testimony as to the facts or the diligence they exercised, or to show affirmatively, or impliedly, that what they did was not reasonable diligence under all the circumstances."

There being no evidence to sustain a verdict for the Defendant, the Court properly directed the jury to find for the Plaintiffs.

**Empire State Cattle Co. v. Atchison etc. R. Co. 210 U. S. 1, 52 L. ed. 931.**

Where the evidence is so conclusive that it would be the duty of the Court to set aside a verdict in favor of the other party a verdict should be directed. The rule as to a scintilla or modicum of issuable testimony which prevails in some of the states does not apply in the Federal Courts.

**McQuire v. Blount, 199 U. S. 142, 148; 50 L. ed. 125, 130.**

**Goff Co. v. Lamborn & Co., 281 Fed. 614 (10), 618;**
**Clarke v. I. C. R. R. Co., 268 Fed. 915 (3), 917.**

## OTHER ASSIGNMENTS ABANDONED

There were other assignments of error but the case is controlled by the questions already discussed. The Defendant in its brief makes no reference to the other assignments and we understand they are abandoned.

**Home Benefit Association v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 1164.**

Respectfully submitted,

ORVILLE A. PARK,
ARCHIBALD B. LOVETT,
Attorneys for Defendant in Error.

JONES, PARK & JOHNSTON,
HITCH, DENMARK & LOVETT,
Of Counsel

## A. B. SMALL COMPANY *v.* LAMBORN & COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 100. Argued October 21, 22, 1924.—Decided March 2, 1925.

1. Contracts for the sale of sugar considered and *held* free from the objection that they made delivery optional with the seller and therefore lacked mutuality. P. 250.
2. In an action by the seller on an intrastate contract for the sale and delivery of goods owned by the seller and title to which passed to the buyer unrestricted under the contract, the buyer can not defend upon the ground that the seller was party to a combination to manipulate interstate trade in goods of that kind in violation of the Anti-Trust Act and made the contract during the life of the combination and in conformity with standards sanctioned by it. It is only when the invalidity is inherent in the contract itself that the Act may be interposed as a defense to it. P. 251.
3. Defenses based on §§ 4, 5 and 6 of the Lever Act, *held* insufficient on grounds stated in *Small Co.* v. *Am. Sugar Co. ante*, 233. P. 252.
4. The duty of a seller of goods, in reselling on account of the buyer, is to sell fairly in a reasonably diligent effort to obtain a good price; the test is not whether he got the highest possible price or as much as others got in particular instances. P. 253.
5. Evidence of particular sales held rightly rejected in the circumstances. *Id.*
6. Where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict should be directed for the other party. P. 254.
7. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury, has met with express disapproval by this Court and by many others. *Id.*

8. Evidence *held* to establish conclusively that resales of goods, made by the vendor, were made fairly and within a reasonable time. P. 254.

Affirmed.

ERROR to a judgment of the District Court in favor of the plaintiff, Lamborn & Co., in an action brought to recover the difference between the contract price of sugar sold by plaintiff to defendant, and the amount obtained by the plaintiff on resale, the defendant having refused to accept delivery.

*Mr. Edgar Watkins*, with whom *Mr. Frederick T. Saussy*, *Mr. Mac Asbill* and *Mr. Horace Russell* were on the brief, for plaintiff in error.

*Mr. Orville A. Park*, with whom *Mr. Archibald B. Lovett* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

On April 30 and May 7, 1920, the parties to this case entered into contracts for the sale by one and purchase by the other of 450 barrels of refined sugar, to be shipped by the seller from a refinery at Port Wentworth, Georgia, to the buyer at Macon, in the same State, between July 15 and October 1. Late in July, 150 barrels were shipped, accepted and paid for. About that time the market price began to decline and continued downward for the rest of the year. Late in August the seller shipped 150 barrels more, but when it reached Macon the buyer refused to accept it, suggested that it be stored "for the benefit of whom it may concern," which was done, and notified the seller that any further shipment would be similarly refused. Correspondence followed in which the seller sought to persuade the buyer to adhere to the contracts. Late in September, before the expiration of the time for completing delivery, the seller notified the buyer that, if

the refusal to conform to the contracts was continued, the remaining 300 barrels, which included the 150 stored at Macon, would be resold for the account of the buyer and the latter would be held for the difference between the contract price and what was realized on the resale. The buyer persisted in the refusal and the sugar was resold.

This action was brought by the seller to recover from the buyer the difference between the contract price and the amount obtained on the resale. In the District Court a verdict and judgment were given to the seller; and the buyer brought the case here on direct writ of error, a constitutional question being involved.

One defense interposed by the answer was that the contracts were wanting in mutuality and therefore void. A demurrer to the defense was sustained, and this is assigned as error. Two clauses in the contracts are cited as making delivery optional with the seller, and therefore showing a want of mutuality. But in our opinion the clauses are not open to that construction. The contracts, signed by both parties, evidenced an agreement by the seller to deliver the sugar within a designated period at a fixed price, as well as an agreement by the buyer to take the sugar and to pay the price. They contemplated that the buyer might be accorded the privilege of calling for special deliveries, known as "withdrawals," during the prescribed period, if the seller was in a position reasonably to make them. And they contained alternative "terms" of payment—"Cash before delivery less 2%, or cash in seven days less 2%." The clauses in question then followed. One was, "Terms and withdrawal subject to the approval of the seller's credit department." Read in the light of established practices in the sugar trade, this clause meant that, when a shipment was made, the seller's credit department was to elect which of the alternative terms of payment should apply, and also that, if the buyer called for special deliveries, known as "with-

drawals," that department was to determine whether such deliveries reasonably could be made and was to approve or disapprove them accordingly. The clause was essentially subsidiary and entirely consistent with the seller's definite agreement to make delivery within the period prescribed. The other clause was to the effect that, "if the supply of raw material of the refinery manufacturing the sugar" should be interrupted by war conditions, embargoes, strikes, or other like cause, and if delivery was thereby prevented, the seller should "not be responsible." There is nothing in this clause which affords any basis for saying that delivery was to be optional with the seller. On the contrary, it recognizes that he was obligating himself to make delivery. Its evident and only purpose was to relieve him from liability in the event that performance of the obligation was prevented by particular circumstances, in their nature beyond his control. It is idle to suggest, as was done in argument, that the clause would permit him to avoid delivery by merely selecting a refinery which by reason of war conditions, embargoes or strikes was already cut off from a supply of raw material. That would not be within either the letter or the spirit of the clause, but would be a palpable fraud and unavailing. *Slater* v. *Savannah Sugar Refining Corporation*, 28 Ga. App. 280, 284.

The answer set up a special defense based on the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, prohibiting restraints and monopolies in interstate and foreign commerce. A demurrer to the defense was sustained and the ruling is assigned as error. But it was plainly right. In the first place, the contracts pertained only to intrastate commerce. They were negotiated in Georgia; the sugar was to be delivered from a refinery at Port Wentworth and shipped to Macon, both in Georgia; and no facts were alleged showing that interstate or foreign commerce was

affected. In the next place, and independently of the character of commerce involved, it was not shown that the contracts were in themselves invalid under the Anti-Trust Act, but only that they were collateral to a combination prohibited by it. In substance, the defense was that the seller and others had entered into a combination to manipulate interstate trade in refined sugar with a view to increasing the price; that the contracts were made during the life of the combination; and that the seller conformed the terms of sale to standards sanctioned by the combination. There was no allegation that it was not the owner of the sugar; nor any allegation that the buyer was a party to the combination or other than a stranger to it. The contracts disclosed the full transaction between the seller and buyer and contemplated that the sale should pass the title without any restriction on the right of the buyer to resell as it might choose. As has been pointed out in prior cases, there is nothing in the Anti-Trust Act which invalidates such a collateral contract or relieves the buyer from his obligation under it. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 550–552; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, 257–259; *Wilder Manufacturing Co.* v. *Corn Products Co.*, 236 U. S. 165, 177. It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. With that exception the remedies which the Act provides for violations of it are exclusive. *Wilder Manufacturing Co.* v. *Corn Products Co.*, *supra*, 172, 175; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 593.

The answer also interposed a number of special defenses based on sections 4, 5 and 6 of the Lever Act, c. 53, 40 Stat. 276; c. 80, 41 Stat. 297, and on particular orders and regulations issued under it. These defenses were held insufficient on demurrer—some on the ground that a part of the Lever Act was in conflict with the due

process of law clause of the Fifth Amendment. Some of the defenses were like those considered and rejected in *Small Co.* v. *American Sugar Refining Company*, just decided, *ante*, p. 233; and what was said of them there suffices to dispose of them here. The want of merit in the others is so obvious that they do not call for special notice. While the ruling on them is assigned as error, no attempt to support them is made in the brief.

The sugar which was resold by the seller for the account of the buyer consisted of 105,000 pounds—the 52,500 pounds stored at Macon and a like quantity remaining at the refinery. The market at that time was unsettled. Wholesale dealers had an oversupply, and retail dealers were buying cautiously and in small quantities. Nevertheless the prices realized on the resales equaled the full market price for that general region for quantities such as were resold. The 52,500 pounds stored at Macon was resold October 11th and that at the refinery November 3d. In both instances the defendant was advised of the price offered by the intending purchaser and was given an opportunity to secure a purchaser at a better price, but none was brought in. A resale of the 52,500 pounds at the refinery was negotiated October 15th, but through some delay in transportation it was not consummated. Another sale was then negotiated and was completed November 3d at a little higher price.

The defendant offered to prove by wholesale dealers in Macon the prices received by them on particular sales to retail dealers about the time of the resales; but the testimony was rejected, and we are asked to say that this was error. We think the ruling was right. The particular sales were in relatively small quantities, many of them under 300 pounds, and had no probative bearing on the fairness of the resales. The real question, as stated in *Small Co.* v. *American Sugar Refining Company*, *supra*, was whether the resales were fairly made in a reasonably

diligent effort to obtain a good price, and not whether the plaintiff got the best possible price, or as much as others got in particular instances. The unsettled state of the market and the difference between selling small quantities to retail dealers to satisfy immediate needs and selling large quantities to wholesale dealers who had an oversupply made is necessary to confine the evidence to the real question.

On the conclusion of the evidence the court directed a verdict for the plaintiff; and the remaining question is whether this was error. The defendant insists that it was, because it took from the jury the question whether the resales were made within a reasonable time. The period for delivery under the contracts expired September 30th, and the court ruled that the duty to resell within a reasonable time arose at that time, which was practically conceded. One of the resales was made October 11th. Another was negotiated October 15th but fell through, and an effective one was made November 3d.

The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others. *Improvement Company* v. *Munson*, 14 Wall. 442, 448; *Pleasants* v. *Fant*, 22 Wall. 116 122; *Bowditch* v. *Boston*, 101 U. S. 16, 18; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *Delaware, etc. R. R. Co.* v. *Converse*, 139 U. S. 469, 472.

We are of opinion that the evidence as set forth in the record conclusively established that the resales were

made within a reasonable time. The state of the market was such that it was difficult to make any sales; and the quantities to be sold enhanced that difficulty and also the need for care. The witnesses for the plaintiff described with much detail the efforts which were made, and the evidence as a whole reasonably admitted of no other conclusion than that the efforts were timely, well directed and persistent. Many bids were received, but almost all were so low that their acceptance would have meant a great sacrifice. The defendant was notified of the purpose to resell, but made no effort to advance it in point of time or to bring in a purchaser at an acceptable price. Considering the state of the market, the outcome appears to have justified both the time and care taken by the plaintiff.

*Judgment affirmed.*